Benjamin Kaas
F. P. Reilly for Kleinert

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 350

THE PEOPLE OF THE STATE OF NEW YORK EX REL. ROSEVALE REALTY CO., INC., PLAINTIFF IN ERROR,

vs.

ALBERT E. KLEINERT, AS SUPERINTENDENT OF THE BUREAU OF BUILDINGS OF THE BOROUGH OF BROOKLYN, CITY OF NEW YORK, AND MIDWOOD MANOR ASSOCIATION AND PAULINE R. KALVIN

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK

45 York Law 45 Sup Ct Rep. 80

FILED APRIL 2, 1924

Reed v Sheldon: 234 N.Y. 492

(30,241)

Lewis G. Mill - 229 N.Y. 213

Graham 266 U.S.

Area Restriction - Enabling Act - Use of Forest

Part II - Board of Appeal

Permit - Bond

(30,241)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 350

THE PEOPLE OF THE STATE OF NEW YORK EX REL. ROSEVALE REALTY CO., INC., PLAINTIFF IN ERROR,

vs.

ALBERT E. KLEINERT, AS SUPERINTENDENT OF THE BUREAU OF BUILDINGS OF THE BOROUGH OF BROOKLYN, CITY OF NEW YORK, AND MIDWOOD MANOR ASSOCIATION AND PAULINE R. KALVIN

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK

INDEX

	Original	Print
Proceedings in court of appeals	1	1
Caption (omitted in printing)	1	1
Remittitur	1*a*	1
Clerk's certificate	1*b*	2
Record from supreme court	1*c*	2
Notice of appeal	1*c*	2
Judgment	3	2
Order to show cause	6	4
Petition	8	5
Affiavit of Hugo Magnuson	16	9
Exhibit A—Letter from T. P. Flannagan to Rosevale Realty Co., September 22, 1922	19	11
Exhibit B—Hearing on a proposed amendment of the Area District Map, Section No. 22	20	11
Exhibit C—Letter from A. E. Kleinert to Magnuson & Kleinert, September 8, 1922	23	13

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., DECEMBER 23, 1924

	Original	Print
Exhibit D—Letter from bureau of buildings to Magnuson & Kleinert, October 13, 1922	24	14
Affidavit of Hugo Magnuson	25	14
Affidavit of I. Henry Kutz	28	15
Exhibit 1—Receipt showing proof of compensation	29	16
Exhibit 2—Letter from M. Tripp to Magnuson & Kleinert, October 23, 1922	30	17
Affidavit of Albert E. Kleinert	31	17
Affidavit of J. George Silberstein	33	18
Exhibit A—Record from supreme court in the case of Pauline R. Kalvin vs. Rosevale Realty Co., Inc., et al.	37	20
Order to show cause	37	20
Summons	40	22
Complaint	41	22
Exhibit B—Indenture between Greater New York Development Company and Anna G. Fugate, March 20, 1912	49	27
Exhibit C—Indenture between Greater New York Development Company and Edward Doran et al., November 29, 1911	55	30
Affidavit of Pauline R. Kalvin	60	32
Gaston Koch	62	33
William H. Milnor	67	36
J. George Silberstein	70	37
Exhibit B—Judgment in the case of Kalvin vs. Rosevale Realty Co.	72	38
Exhibit C—Building zone amendment, April 13, 1917	75	39
Exhibit D—Petition for change of zone	76	39
Stipulation to omit map of Midwood Manor in printing, appellate division	77	40
Opinion, Faber, J., appellate division	78	41
Affidavit of Benjamin Reass	79	41
Stipulation waiving certification, appellate division	80	42
Exhibit in Evidence—Map of Midwood Manor	81	42
Judgment, appellate division	82	42
Notice of appeal	84	43
Affidavit of Murry C. Becker	86	44
Stipulation waiving service	87	44
Judgment	88	45
Affidavit of Hugo Hirsh	90	45
Writ of error	91	46
Order allowing writ of error	93	47
Assignments of error	95	47
Petition for writ of error	98	49
Bond on writ of error (omitted in printing)	105	52
Citation and service (omitted in printing)	108	52
Clerk's certificate, supreme court	110	52
Clerk's certificate	112	53
Order of affirmance	113	54

[fol. 1] CAPTION—Omitted

[fol. 1a] **IN COURT OF APPEALS**

THE PEOPLE, etc., ex rel. ROSEVALE REALTY CO., INC., Appellant,

ag'st

ALBERT E. KLEINERT, as Superintendent, &c., Respondent; MIDWOOD MANOR ASSOCIATION & ANO., Intervenors, Respondents

REMITTITUR—February 20, 1924

Be it remembered that on the 15th day of December in the year of our Lord one thousand nine hundred and twenty-three Rosevale Realty Co., Inc., the appellant, in this cause, came here unto the Court of Appeals, by Hirsh, Newman & Reass, its attorneys, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And Albert E. Kleinert, as Superintendent, &c., and ors. the respondents in said cause, afterwards appeared in said Court of Appeals by George P. Nicholson, and ano. their attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon the said Court of Appeals having heard this cause argued by Mr. Benjamin Reass, of counsel for the appellant, by Mr. Charles J. Druhan of counsel for the respondent, Albert E. Kleinert, as Respdt. &c., and by Mr. James Marshall, of counsel for Intervenors, Respondents, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, with costs.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court there to be proceeded upon according to law.

[fol. 1b] Therefore, It is considered that the said order be affirmed with costs as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

Wm. J. Armstrong, Clerk of the Court of Appeals of the State of New York.

IN COURT OF APPEALS

CLERK'S CERTIFICATE—February 20, 1924

I hereby certify that the preceding record contains a correct transmit of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

Wm. J. Armstrong, Clerk. (Seal.)

[fol. 1c] IN SUPREME COURT OF NEW YORK, KINGS COUNTY

THE PEOPLE OF THE STATE OF NEW YORK ex Rel. ROSEVALE REALTY CO., INC., Plaintiff,

against

ALBERT E. KLEINERT, as Superintendent of the Bureau of Buildings of the Borough of Brooklyn, City of New York, Defendant

NOTICE OF APPEAL

Please take notice, that the above named plaintiff, Rosevale Realty Co., Inc., hereby appeals to the Appellate Division of the Supreme Court for the Second Judicial Department, from the order of this Court dated March 21, 1923, and entered in the office of the Clerk of Kings County on March 22nd, 1923, denying the motion of the plaintiff for the issuance of an order for a peremptory mandamus directing the above named Albert E. Kleinert, as Superintendent of the Bureau of Buildings of the Borough of Brooklyn, City of New [fol. 2] York, to do certain things set forth in the order to show cause obtained by said plaintiff, and the said plaintiff appeals from each and every part of said order, as well as the whole thereof.

Dated New York, March 27th, 1923.

Yours, etc., Hirsh, Newman & Reass, Attorneys for Plaintiff, 100 Broadway, New York City.

To George P. Nicholson, Corporation Counsel, Attorney for Respondent, Albert E. Kleinert, as Superintendent, etc.; J. George Silberstein, Esq., Attorney for Intervenors, 120 Broadway, New York City.

[fol. 3] IN SUPREME COURT OF NEW YORK

[Title omitted]

ORDER APPEALED FROM

An Order to show cause having heretofore issued out of this Court, dated the 26th day of January, 1923, requiring the defendant, Albert E. Kleinert, as Superintendent of the Bureau of Buildings of

the Borough of Brooklyn, City of New York, to show cause why a peremptory mandamus order should not be granted herein., directing him to forthwith take up and pass upon and approve the plans filed by the petitioner herein on September 1, 1922, under file No. 1521, 1922, in the office of the said Superintendent of the Bureau of Buildings, Borough of Brooklyn, City of New York, and grant plaintiff a permit to erect a building described in said application; and the said motion having duly come on to be heard at a Special Term, Part I of this Court on the 2nd day of February, 1923,

[fol. 4] Now after reading and filing the said order to show cause, signed by Hon. John MacCrate, a Justice of the Supreme Court, which order was dated the 26th day of January, 1923, the petition of the Rosevale Realty Co., Inc., dated and verified the 25th day of January, 1923, the affidavit of Hugo Magnuson, sworn to the 25th day of January, 1923, and Exhibits A, B, C and D, all read in favor of the motion, and the affidavit of Albert E. Kleinert, sworn to the 13th day of February, 1923, the affidavit of J. George Silberstein, sworn to the 13th day of February, 1923, the order to show cause in the action of Pauline R. Kalvin, plaintiff, against the Rosevale Realty Co., Inc., and Albert E. Kleinert, as Superintendent of the Bureau of Buildings, Borough of Brooklyn, City of New York, defendants, which said order was signed by Hon. Mitchell May, a Justice of this Court, and was dated September 19, 1922, the summons and complaint in said action of Pauline R. Kalvin, against the Rosevale Realty Co., Inc., and Albert E. Kleinert, as Superintendent of the Bureau of Buildings, Borough of Brooklyn, City of New York, which complaint was verified the 19th day of September, 1922, the answer of Albert E. Kleinert, as Superintendent of Bureau of Buildings, Borough of Brooklyn, City of New York, and of the Rosevale Realty Co., Inc., and Albert E. Kleinert, as Superintendent of the Bureau of Buildings, Borough of Brooklyn, City of New York, the affidavit of Pauline R. Kalvin, sworn to the 19 day of September, 1922, the affidavit of Gaston Koch, sworn to the 26th day of September, 1922, the affidavit of William H. Milnor, sworn to the 19th day of September, 1922, the affidavit of J. George Silberstein, sworn to the 19th day of September, 1922, the order of Hon. [fol. 5] Harry E. Lewis, a Justice of the Supreme Court, dated the 20th day of October, 1922, which said latter affidavits were submitted in the action of Pauline R. Kalvin, plaintiff against the Rosevale Realty Co., Inc., and Albert E. Kleinert, as Superintendent of the Bureau of Buildings of the Borough of Brooklyn, City of New York, defendants, and which affidavits were also interposed in opposition to this motion; exhibits A, B, C and D annexed to the replying affidavits of Hugo Magnuson, verified March 1, 1923; of I. Henry Kutz, verified March 2, 1923, and exhibits annexed and the additional affidavits of J. George Silberstein verified March 2, 1923, and exhibits "A" annexed.

And after hearing Hirsh, Newman and Reass, Esqs., by Hugo Hirsh, of counsel in favor of this motion for a mandamus order and George P. Nicholson, Corporation Counsel, by Joseph P. Reilly, Esq., Assistant Corporation Counsel in opposition to said motion,

and J. George Silberstein, Esq., attorney for the Midwood Manor Association and Pauline R. Kalvin, Intervenors;

Now, on motion of George P. Nicholson, Corporation Counsel it is

Ordered that the said motion be and the same hereby is in all respects denied with $10.00 costs.

Enter,

L. B. Faber, J. S. C.

Granted Mar. 21, 1923. William E. Kelly, Clerk.

[fol. 6] In Supreme Court of New York, Kings County

[Title omitted]

Order to Show Cause

Upon the annexed petition of Rosevale Realty Co., Inc., duly verified the 25th day of January, 1923, and upon the annexed affidavit of Hugo Magnuson duly verified the 25th day of January, 1923, let the above named Albert E. Kleinert, as Superintendent of the Bureau of Buildings of the Borough of Brooklyn, City of New York, or his attorney, show cause, at a Special Term, Part I of the Supreme Court of the State of New York to be held in and for the County of Kings, at the County Court House in the Borough of Brooklyn, on the 2nd day of February, 1922, at ten o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, why a peremptory mandamus order should not be granted herein, [fol. 7] directing the above named Albert E. Kleinert, as Superintendent of the Bureau of Buildings of the Borough of Brooklyn, City of New York, to forthwith take up and pass upon and approve the plans filed by the petitioner herein on September 1st, 1922, under file number 15021, 1922, in the Office of the said Superintendent of the Bureau of Buildings, and grant plaintiff a permit to erect the building described in said application, and why such other and further relief should not be granted to the petitioner herein, together with the costs of this proceeding.

Sufficient reason appearing therefor, let service of this order and copies of the annexed petition and affidavit on or before January 30th, 1923, be deemed good and sufficient service thereof.

Dated, January 26th, 1923.

John McCrate, Justice of the Supreme Court of the State of New York.

[fol. 8] In Supreme Court of New York, Kings County

[Title omitted]

Petition

To the Supreme Court of the State of New York:

The petition of the Rosevale Realty Co., Inc., respectfully shows to this Court as follows:

First. That your petitioner is a corporation, duly organized and existing under and by virtue of the Laws of the State of New York, and has its principal place of business at 189 Montague Street, in the Borough of Brooklyn, County of Kings, City and State of New York.

Second. That your petitioner is the owner in fee simple of the premises located on the northeast corner of Avenue J and East 10th Street in the Borough of Brooklyn, City of New York, which said premises are 100 ft. front on Avenue J and 100 ft. rear by 100 ft. deep on East 10th Street and 100 ft. on the inside known and designated as 1001-1011 Avenue J, Borough of Brooklyn, City of New York.

[fol. 9] Third. That your petitioner was such owner at all the times hereinafter mentioned, and still is the owner of the said premises.

Fourth. That your petitioner acquired title to the said premises by various purchases on and between the 1st day of March, 1922 and the 10th day of April, 1922.

That thereafter, your petitioner caused certain plans and specifications for the erection upon the said premises of an apartment house, to be prepared by one Hugo Magnuson, a duly registered architect, having his place of business at No. 52 Vanderbilt Avenue in the Borough of Manhattan, City of New York; that said plans and specifications called for the erection of a brick apartment house, arranged for forty famil-es; that the said plans and specifications were duly prepared by the said architect in accordance with the laws applicable thereto, in accordance with the building zone restrictions adopted by the City of New York then in existence and the rules and regulations of the municipal departments having jurisdiction thereof, including the Bureau of Buildings of the Borough of Brooklyn, City of New York, as appears by the annexed affidavit of the said Hugo Magnuson.

Fifth. That on July 18th, 1922, the said plans were duly filed in the office of the Tenement House Department of the Borough of Brooklyn, City of New York, and thereafter and on or about August 31st, 1922, the same were duly approved by the said Tenement House Department and were thereupon forwarded to the Bureau of Buildings in the said Borough and said plans were then duly filed in the

office of the Bureau of Buildings of the Borough of Brooklyn, City of New York, by your petitioner under file Number 15021, year 1922, [fol. 10] for the purpose of having the aforesaid plans duly approved by the Superintendent of the said Bureau of Buildings Albert E. Kleinert or his proper subordinates, and a permit for the erection of the building described therein issued to your petitioner.

Sixth. Upon information and belief that Albert E. Kleinert, the defendant above named, is the Superintendent of the Bureau of Buildings of the Borough of Brooklyn, City of New York, by his duly charged with the duties incidental to the approval of plans filed in his office and issuance of permits providing for the erection of buildings in the said Borough of Brooklyn, City of New York.

Seventh. That thereafter, and on or about September 1st, 1922, the said Albert E. Kleinert, as Superintendent of the Bureau of Buildings of the Borough of Brooklyn, City of New York, by his duly acting superintendent, duly issued or caused to be issued a temporary permit under the said file Number 15021-1922, for the installation of necessary footings and foundations for the above described building.

Eighth. That on September 2nd, 1922, the said defendant, Albert E. Kleinert, by his duly acting superintendent of the Bureau of Buildings aforesaid, revoked the aforesaid temporary permit dated September 1st, 1922, at the same time notifying your petitioner that the said temporary permit was revoked because of a petition by the owners of fifty per cent or more of frontage on East 10th Street, between what is known as the L. I. R. R. cut and Avenue K, which was forwarded to the Board of Estimate & Apportionment to place the prescribed locality wholly in the "E" District or zone, which district or zone prohibits the class of construction intended by your [fol. 11] petitioner's application hereinbefore referred to. That annexed hereto is a copy of said notice received by your petitioner.

Ninth. That the defendant Albert E. Kleinert, as Superintendent of the Bureau of Buildings aforesaid, refused to approve the plans submitted by your petitioner as aforesaid and refused to issue a permit to petitioner to erect the building described herein and notified your petitioner in writing—through his architect—that he would not issue said permit even if the said plans are found to comply with all the requirements of the Bureau of Buildings of the Borough of Brooklyn, pending the action of the Board of Estimate and Apportionment upon the application to change the zone area in which said premises are located, to an "E" district or zone. That annexed hereto and made a part hereof as Exhibit A is a copy of said written notice received by your petitioner's architects from the defendant.

Tenth. Upon information and belief that an application to change the locality in which the premises affected by your petitioner's aforesaid application are located to the "E" area or zone, namely, by changing from "C" to an "E" area district East 10th Street be-

tween a right-of-way of the Manhattan Beach Division to the L. I. R. R. and Avenue K, Borough of Brooklyn, was filed by certain persons with the Board of Estimate and Apportionment on or about August 1st, 1922. That no reasons were presented by said persons in support of said application; that at a meeting of the Board of Estimate and Apportionment held on September 22, 1922 said application was referred to the Committee on City Plan and Public Improvements; that the said application was considered by the said Committee at its meeting held on September 26, 1922; that at the meeting of the Board of Estimate and Apportionment held on Octo- [fol. 12] ber 20, 1922, the said Committee on City Plan and Public Improvements recommended favorable action in regard to the said application, and said Board of Estimate and Apportionment duly passed a resolution amending the so-called "zoning resolution" adopted by said Board on July 25, 1916 by changing the area district map, section No. 22, so as to change from a "C" zone to an "E" area district where not heretofore established, East 10th Street from the Manhattan Beach Division of the Long Island Railroad to the northerly line of Avenue K, Borough of Brooklyn, and the minutes of the meeting of said Board of Estimate and Apportionment at which said resolution was adopted, and insofar as they are concerned with said resolution, are annexed hereto as Exhibit B and made part hereof.

Eleventh. That your petitioner has duly complied with all the rules, regulations, requirements and laws in effect or existence on July 18, 1922, at the time when said plans were filed with said Bureau of Buildings and which have not been changed since said date, for the purpose of having such plans approved by the Superintendent of the Bureau of Buildings or his subordinates, and a permit issued, but the said Superintendent and his subordinates have arbitrarily refused to approve said aforesaid plans and specifications for your petitioner, although the said plans were duly approved by the Tenement House Department on August 31st, 1922 and were filed in the Office of the Bureau of Buildings on September 1st, 1922 and although the application for the change of area district referred to herein was not filed until August 1st, 1922 and the Board of Estimate and Apportionment did not pass the resolution purported to change [fol. 13] said area district until October 20, 1922, and that the owner, your petitioner, had duly filed his plans and specification in the Tenement House Department prior to the application to the Board of Estimate and Apportionment for a change of area district affecting said premises; that said plans and specifications should be examined, passed upon and approved by the said Superintendent of Buildings and a permit issued by him to your petitioner; that the refusal of the Superintendent of Buildings to pass upon and approve said plans and to issue a permit by reason that the above mentioned application for change of area district filed August 1st 1922 and by reason of resolution of the Board of Estimate and Apportionment adopted on October 20th, 1922, above referred to, and the said resolution of the Board of Estimate and Apportionment deprives

your petitioner of rights guaranteed to your petitioner by the Constitution of the United States and the Constitution of the State of New York, and especially by Section 1, Article XIV, of the Amendments to the Constitution of the United States and Section 6 Article 1 of the Constitution of the State of New York, by depriving your peitioner of its property without due process of law and by denying to your petitioner the equal protection of the laws.

Twelfth. That the so-called Zoning Resolutions of the Board of Estimate and Apportionment adopted July 25th, 1916, provides by the terms of Sections 23 and 24 thereof, that amendments to area districts are not to apply to existing buildings and that buildings for which a building permit has been issued plans for which are on file with the Superintendent of Buildings are existing buildings and that therefore, the property of your petitioner is not by the very terms of [fol. 14] the Zoning Resolution affected by the purported amendments thereto and hereinabove referred to and adopted by the Board of Estimate and Apportionment on October 20th, 1922.

Thirteenth. That your petitioner has suffered irreparable damage and will suffer irreparable damage because of the failure of the said Superintendent of the Bureau of Buildings and his subordinates to approve the said plans and issue a permit without any justification therefor.

Wherefore, your petitioner prays that the said Albert E. Kleinert as Superintendent of the Bureau of Buildings of the Borough of Brooklyn, City of New York, be directed to take up and examine and approve the aforesaid plans of your petitioner and to issue a permit to your petitioner in accordance with the rules, regulations and laws in existence on July 18th, 1922, provided for in such case and your petitioner further prays that because of the urgency of the matter, that an order to show cause returnable in less than eight days be made; and for such other and further relief as may be equitable and just in the premises, together with the costs of these proceedings.

That no previous application for this or any similar order has been made except one dated September 8th, 1922, which was denied by an order of Mr. Justice James C. Van Siclen on October 25, 1922, sitting at Special Term, Part I of this court, and on December 1st, 1922, said order denying the application was affirmed by the Appellate Division of the Supreme Court for the Second Department but expressly with leave to renew in words as follows:

"Although we think that the superintendent of the Bureau of Buildings has no power or discretion to refuse a permit on the [fol. 15] ground that the proposed building violates a restrictive covenant, as this is not a matter for him to decide, yet in view of the fact that this court has issued an injunction prohibiting the petitioner from constructing the building in question, we have decided to affirm this order, without prejudice to an application to be made after the vacation or termination of the injunction. Order affirmed,

without costs Blackmar, P. J., Rich, Kelly, Manning and Young, J. J., concur."

Dated, New York, January 25th, 1923.

Rosevale Realty Co., Inc., by Lazarus Rosenberg, Petitioner.

Jurat showing the foregoing was duly sworn to by Lazarus Rosenberg omitted in printing.

[fol. 16] In Supreme Court of New York, Kings County

[Title omitted]

Affidavit of Hugo Magnuson

State, City and County of New York, ss:

Hugo Magnuson, being duly sworn, deposes and says: That he is a duly registered architect in the State of New York, having an office at No. 52 Vanderbilt Avenue in the Borough of Manhattan, City of New York.

That prior to July 18th, 1922, deponent prepared plans and specifications for the erection of a brick apartment house arranged for forty families to be erected upon the premises located on the northeast corner of Avenue J and East 10th Street, in the Borough of Brooklyn, City of New York, which said premises are 100 ft. front on Avenue J and 100 ft. rear by 100 ft. deep on East 10th Street and 100 ft. on the inside known and designated as 1001-1011 Avenue J, Borough of Brooklyn, City of New York.

That thereafter, and on or about August 31st, 1922, the said plans and specifications were duly approved by the Tenement House De-[fol. 17] partment of the Borough of Brooklyn, City of New York and that thereafter, and on or about September 1st, 1922, your deponent, in behalf of the said petitioner, caused the said plans and specifications to be filed in the office of the Superintendent of the Bureau of Buildings of the Borough of Brooklyn, City of New York, under file Number 15021, year 1922, for the purpose of having said plans and specifications approved by the said Superintendent of Buildings or his subordinates.

That the said plans and specifications were duly prepared by your deponent and the same complied in all respects with all the rules, regulations and laws applicable thereto on July 18th, 1922, including zone restrictions, which have not been changed since said date.

That your deponent has prepared plans and specifications for similar buildings as that described herein and in the annexed petition for ten years last past and verily believes that the said plans and specifications of this petitioner duly comply with all the laws, rules and regulations as aforesaid.

That on September 2, 1922, the said Superintendent of Buildings advised deponent and notified deponent in writing that he would not take up or pass upon or approve the plans and specifications of petitioner or issue a permit to petitioner even though his plans complied with all the requirements of the Bureau of Buildings of the Borough of Brooklyn, City of New York, pending the action of the Board of Estimate and Apportionment upon the application to change the zone area in which said premises are located to an "E" district or zone; that thereafter and on September 8th, 1922, certain changes in the original plans were ordered by the Building Department of the Borough of Brooklyn, as evidence by the letter hereto [fol. 18] annexed and made part hereof marked Exhibit C. That since said changes were ordered the same have been made in the original plans on file in the Building Department and the changes in said plans as made by your deponent have been approved by the inspector of the Building Department so that said plans now on file with the Building Department comply in all respects with all the requirements of the said Department; that annexed hereto and marked Exhibit D is the usual formal slip of the Building Department dated October 13th, 1922, showing that all objections made by the said Department to the plans on file have been duly complied with.

That under the restrictions of the "E" area district, petitioner could cover only 6,600 square feet of their 100 x 100 lot on the first floor and 3,800 square feet on the upper floors, namely 61 per cent and 35 per cent of the lots respectively; but that under the regulations of the existing "C" area district, petitioner could cover 90 per cent of the area of their lot with a building.

That deponent has read the annexed petition of Rosevale Realty Co., Inc., and the same is in all respects a true statement of the facts affecting the said application Number 15021 hereinbefore referred to.

Hugo E. Magnuson.

Sworn to before me this 25th day of January, 1923. Julien W. Newman, Commissioner of Deeds, City of N. Y., Queens Co., No. 3488, Kings Co. No. 27, Reg. No. 3026, N. Y. Co. No. 53, Reg. No. 23020. Commission expires Oct. 11, 1923.

[fol. 19] IN SUPREME COURT OF NEW YORK

EXHIBIT A, READ IN SUPPORT OF MOTION

The City of New York

Office of President of the Borough of Brooklyn, Bureau of Buildings, Albert E. Kleinert, Superintendent

September 2nd, 1922.

Application No. 15021

Rosevale Realty Co., 189 Montague Street, Brooklyn, N. Y.

GENTLEMEN: You are hereby notified that I have this day revoked temporary permit for the installation of footings and foundations for the erection of one (1) Building, premises Avenue J, Northeast corner of East 10th Street, said building contemplated being an apartment house for forty (40) families, by reason of a petition by owners of 50 per cent or more of frontage on East 10th Street, between what is known as the L. I. R. R. cut and Avenue K, which was forwarded to the Board of Estimate and Apportionment, to place the prescribed locality wholly in the "E" district or zone, which district or zone prohibits the class of construction intended by Application No. 15021.

Yours very truly, Thomas P. Flannagan, Chief Inspector and Acting Superintendent WWRGAB.

[fol. 20] EXHIBIT B, READ IN SUPPORT OF MOTION

Hearing on a proposed Amendment of the Area District Map, Section No. 22, by changing from a "C" to an "E" Area District East 10th Street from the Manhattan Beach Division of the Long Island Railroad to the Northerly line of Avenue K, Borough of Brooklyn (Cal. No. 15).

The Secretary presented affidavits of publication showing that the matter had been duly advertised in accordance with a resolution adopted September 22, 1922 (Cal. No. 362), and the following report of the Committee on City Plan and Public Improvements:

October 16, 1922.

Board of Estimate and Apportionment.

GENTLEMEN: At the meeting of the Board of Estimate and Apportionment held on September 22, 1922 (Cal. No. 362), there was referred to the Committee on City Plan and Public Improvements the petition of Marcus Rottenberg, and a number of others requesting the amendment of Section No. 22 of the Area District Map by changing from a "C" to an "E" area district East 10th Street between the right-of-way of the Manhattan Beach Division of the Long Island Railroad and Avenue K, Borough of Brooklyn.

This matter was considered by the Committee at its meeting held on September 26th at which time a report was presented by the Chief Engineer, of which a copy is transmitted herewith, recommending favorable action, which recommendation is concurred in by the Committee.

Respectfully Henry Bruckner, President, Borough of the Bronx, Chairman, Committee on City Plan and Public Improvements.

[fol. 21] Report No. 23128

September 26, 1922.

Committee on City Plan and Public Improvements, Board of Estimate and Apportionment.

GENTLEMEN: At the meeting of the Board of Estimate and Apportionment held on September 22, 1922 (Cal. No. 362), a date for a public hearing was fixed for October 20th, concerning the petition of Marcus Rottenberg and a number of others, requesting the amendment of the Building Zone Resolution by changing from a "C" to an "E" area district, East 10th Street between the right-of-way of the Manhattan Beach Division of the Long Island Railroad and Avenue K, in the Borough of Brooklyn, and at the same time the matter was referred to your Committee with instructions to the Chief Engineer to submit a report. The petition which is dated July 10th, was transmitted for the consideration of the Board by the Acting President of the Borough under date of July 31, 1922.

No reasons are presented by the petitioners in support of the proposed change. The petition, however, bears the names of more than 75 property owners within the area affected, who represent fully 70 per cent of the frontage proposed to be changed.

On the use district map East 10th Street is located in a residence district in the section now under consideration and a similar designation applies to a large adjoining area upon the south and west, but Coney Island Avenue, the adjacent street on the east, is designated for business use. On the area district map nearly all of the section affected by the petition is located in a "C" district, which is appropriate for an apartment house development. Exceptions to this designation exist in the case of both westerly corners of Avenue I and Avenue J, which are located in an "E" area district forming a part [fol. 22] of a considerable similar area in this vicinity lying to the west of East 10th Street. The "E" area district is particularly appropriate for detached or semi-detached dwellings.

An inspection shows that the property to which the petition relates is almost fully improved with detached dwellings. The street is paved but no bridge has been provided on the line of East 10th Street across the Long Island Railroad, to the north of which there is a lumber yard.

In view of the existing development and in recognition of the substantial petition of the property owners favoring the change, I would recommend that the requested modification be approved.

Respectfully, Arthur S. Tuttle, Chief Engineer.

Hugo Hirsh, representing Rosevale Realty Company, appeared in opposition.

Aaron W. Levy, representing Midwood Manor Property Owners, appeared in favor.

No one else appeared. The hearing was closed.

The following resolution was offered.

Resolved, By the Board of Estimate and Apportionment, that the resolution entitled: "A resolution regulating and limiting the height and bulk of buildings hereafter erected and regulating and determining the area of yards, courts and other open spaces, and regulating and restricting the location of trades and industries and the location of buildings designed for specified uses and establishing the boundaries of districts for the said purposes," adopted July 25, 1916, be and the same is hereby amended by changing the Area District Map, Section No. 22, so as to change from a "C" to an "E" Area District, [fol. 23] where not heretofore established, East 10th Street from the Manhattan Beach Division of the Long Island Railroad to the northerly line of Avenue K, Borough of Brooklyn.

Which was adopted by the following vote:

Affirmative—The Mayor, the Comptroller, the President of the Boroughs of Manhattan and Brooklyn, the Acting President of the Borough of the Bronx and the Presidents of the Boroughs of Queens and Richmond —13.

EXHIBIT C, READ IN SUPPORT OF MOTION

The City of New York

Office of the President of the Borough of Brooklyn, Bureau of Buildings, Albert E. Kleinert, Superintendent

Sept. 8, 1922.

Messrs. Magnuson & Kleinert, 52 Vanderbilt Ave., N. Y. C.

DEAR SIRS: Answering your communication of September 6th with reference to the bureau's application 15021/22—premises 1001/1011 Ave. J—permit me to advise you that the plans are now in the hands of this bureau's examiners for consideration. If they are found to comply with the code they will be so marked, but the permit will be withheld pending action of the Board of Estimate & Apportionment on a petition which has been presented to that body to change the character of the zoning district.

Yours very truly, Albert E. Kleinert, Superintendent.

WWR:BAH.

[fol. 24] EXHIBIT D, READ IN SUPPORT OF MOTION

Bureau of Buildings

City of New York, Borough Hall, Brooklyn, Borough of Brooklyn, the City of New York

10-13-22.

Magnuson and Kleinert, 52 Vanderbilt Ave., N. Y. C.:

In the matter of Application No. 15021 1922 Location N. E. cor. Ave. J. & E. 10th St.

Plumbing

The following objections have been filed by the examiners.
1—O.K. for Duplicate Plans. T. M.
Construction 10-14-22.
O.K. for Dup. Prints. W. S.

[fol. 25] IN SUPREME COURT OF NEW YORK, KINGS COUNTY

[Title omitted]

AFFIDAVIT OF HUGO MAGNUSON

STATE, CITY AND COUNTY OF NEW YORK, ss:

Hugo Magnuson, being duly sworn, deposes and says that he is a duly registered architect of the State of New York, having an office at 52 Vanderbilt Avenue, New York City, and doing business under the firm name and style of Magnuson & Kleinert.

That deponent prepared plans and specifications for the building which relator desires to build, and which are involved herein as set forth in more detail in deponent's affidavit, verified January 25, 1923, and attached to the petition herein.

That deponent was in active charge of the filing of said plans with the various authorities, for the purpose of obtaining a building permit.

[fol. 26] That after the approval of said plans and specifications by the Tenement House Department on August 31, 1922, as set forth more fully in deponent's beforementioned affidavit attached to the petition, he caused, on behalf of the relator, the said plans and specifications to be filed in the office of the Superintendent of the Bureau of Buildings of the Borough of Brooklyn, and that at that time proof of having obtained compensation insurance, as required by Sec. 57, Chap. 615, Laws of 1922, was filed with said Superintendent of the Bureau of Buildings, and a card a copy of which is annexed hereto marked Exhibit 1, was given by the Superintendent of Buildings, the defendant herein, evidencing that the proof of compensation insurance had been satisfactorily made.

That it is not true, as alleged in the affidavit of Albert E. Kleinert, dated February 13, 1923, and submitted in opposition, "That the plaintiff has not filed proof of having obtained compensation insurance, as required by Sec. 57, Chap. 615, Laws of 1922.

That upon filing said proof of compensation, defendant issued a temporary permit for the installation of the necessary footings and foundations, and that said temporary proof could not have been issued unless the proof of compensation insurance had been filed, as required by Law.

That your deponent has prepared plans and specifications for similar buildings as that described herein for ten years last past, and well knows the procedure of the office of the Bureau of Buildings, the defendant herein, and knows that according to the cus- [fol. 27] tom of the office, proof of compensation insurance must be filed before a temporary permit will be granted, and that a temporary permit was granted herein, though later revoked. That according to the custom of that office, where proof of compensation insurance, as required by Statute, has been filed, for the purpose of obtaining a temporary permit, no further proof is required in order to obtain a final permit or at any other time.

Deponent further alleges that even if relator had not filed proof of having obtained compensation insurance, the Superintendent of the Bureau of Buiidings, the defendant herein, revoked the temporary permit and refused to grant a final permit solely on the ground that the plans filed did not comply with the provisions of the Zoning Resolution, and on no other grounds, and made no mention of any failure to file proof that compensation insurance had been obtained, as shown by exhibits A and C, attached to the moving papers herein, nor could he well have done so, for, as a matter of fact, the required proof had been filed by your deponent, as above alleged.

Hugo Magnuson.

Sworn to before me, this 1st day of March, 1923. Julien W. Newman, Commissioner of Deeds, City of New York; Queens Co. No. 8485; Kings Co. No. 27; Reg. No. 3026; N. Y. Co. No. 53; Reg. No. 23020; Commission expires Oct. 11, 1923.

[fol. 28] In Supreme Court of New York, County of Kings

[Title omitted]

Affidavit of I. Henry Kutz, Read in Support of Motion

State, City and County of New York, ss:

I. Henry Kutz, being duly sworn, deposes and says: I am an attorney associated with the attorneys for the relator herein and well acquainted with the facts herein.

After the other papers in this proceeding had been prepared and when it was too late to include the same in the affidavits made by the president of the relator or by Hugo Magnuson, the architect, the paper, a copy of which is annexed hereto, marked Exhibit 2, was received in the office of the attorneys for the relator, from the office of Hugo Magnuson, whose affidavit is attached hereto.

Exhibit 2, which is dated October 23, 1922, shows that the plans [fol. 29] were rejected by the Superintendent of the Bureau of Buildings, on the sole ground that they were contrary to the Zoning Resolution, and on no other ground.

I. Henry Kutz.

Sworn to before me, this 2nd day of March, 1923. Murray C. Becker, Notary Public No. 412; Kings County; Kings County Register's No. 3079; Certificate filed in New York County; Clerk's No. 241, Register's No. 3305; Certificate filed in Bronx County; Clerk's No. 18; Register's No. 48; Commission expires March 30th, 1923.

Exhibit 1, Read in Support of Motion

President of the Borough of Brooklyn

Bureau of Buildings

Applicant's Receipt

No. 23. (Stamp) 15021

Note.—The number on this card and the number on application must agree.

Do not lose this receipt.
Location Ave. J, N. E. Cor. E. 10th St.
Number of Paper Filed 9.
Number of Plans Filed —.
Received by Plan Clerk.
Name of Applicant Footings & Foundations —.
Date of Filing T. P. F. 9-1-22.
(Stamped on face, Received Aug. 31, 1922. R. F. C.)

On the reverse side of the card, 9-1-22. Proof of Compensation and stamp on reverse side of card received Oct. 17, 1922. J. P. C. Jemullin. O. K.

[fol. 30] EXHIBIT 2, READ IN SUPPORT OF MOTION

City of New York, Borough Hall, Brooklyn

Borough of Brooklyn

The City of New York, 10-23-22.

Mr. Magnuson & Kleinert, 52 Vanderbilt Ave., Manhattan:

In the Matter of Application No. 15021. 1922.
Location N. E. Cor. of Ave. J. & E. 10th St.
The following objections have been filed by the examiners.
Contrary to Bldg. Zone Res. Art. IV Para. 15C.

M. Tripp.

(Stamp:) Albert E. Kleinert, Superintendent.
Denied Oct. 23, 1922, per M. Tripp.

[fol. 31] IN SUPREME COURT OF NEW YORK, KINGS COUNTY

[Title omitted]

AFFIDAVIT OF ALBERT E. KLEINERT, READ IN OPPOSITION TO MOTION

CITY OF NEW YORK,
County of Kings, ss:

Albert E. Kleinert, being duly sworn, deposes and says, that he is the defendant in the above-entitled proceeding.

Deponent alleges that plaintiff has not complied with the rules, regulations and requirements of the Building Code and of the Building Zone Resolution, adopted July 25, 1916, and the amendments thereto, in that the plans it filed with the Bureau of Buildings are for a forty family apartment house which it proposes to construct upon land lying in an "E" Area District and a Residence District, as designated on the "Use" Map and said buildings as shown on the plans would be in violation of the rules and regulations which apply to such districts.

Deponent further alleges that plaintiff is not entitled to a build-
[fol. 32] ing permit under Sections 23 and 24 of the Building Zone Law, as it alleges in paragraph "Twelfth" of its petition. That said Section 23 applies only to buildings existing at the time of the enactment of the Building Zone Law or Resolution which was July 25, 1916, or which exist at the time of an amendment thereto, while Section 24 applies only to permits which had been issued and plans which had been filed prior to or "at the time of the passage of this resolution, and a permit for the erection of which is issued within three months of the passage of this resolution," which was also on July 25, 1916; that plaintiff admits that its plans were not filed

with the Tenement House Department until about July 18, 1922, and with the Bureau of Buildings until August 31, 1922; that, therefore, plaintiff's plans did not come within the provisions of said Sections 23 and 24, and it is not lawfully entitled to a building permit by reason of the provisions of said section.

That the plans of the plaintiff have been examined and found to comply with the structural requirements of the Building Code, but the approval thereof was denied on October 23, 1922, because the proposed building was to be constructed in an E Area District, and contrary to the rules and regulations of the Building Zone Law applicable to such district; that the plaintiff has not filed proof of having obtained compensation insurance, as required by Section 57, Chapter 615, Laws of 1922.

Wherefore defendant, upon the foregoing and the annexed affidavits and papers, asks that the motion of the plaintiff be denied.

Albert E. Kleinert.

Sworn to before me this 13th day of February, 1923. Vincent D. Curran, Commissioner of Deeds, City of New York.

[fol. 33] In Supreme Court of New York, Kings County

[Title omitted]

Affidavit of J. George Silberstein, Read in Opposition to Motion

State of New York,
County of New York, ss:

J. George Silberstein, being duly sworn, deposes and says:

I am attorney for the Midwood Manor Association, an unincorporated association, representing the residents and property owners of the territory located between the Long Island Railroad Cut and Avenue K, between Ocean Parkway and Coney Island Avenue. This association was organized for the purpose of protecting the general welfare and common interests of the residents of this territory.

On or about September 19, 1922, on behalf of Pauline R. Kalvin, one of the residents of said Midwood Manor section, I commenced an action to enjoin the Rosevale Realty Company, Inc., from con-[fol. 34] structing a tenement on Avenue J and East 10th Street. It is for the construction of this same tenement that the relator, Rosevale Realty Company, Inc., is now seeking to mandamus the Building Superintendent to grant it a permit. At that time and until January 1st, 1923, the entire Midwood Manor section, including the corner of Avenue J and East 10th Street, was subject to restrictive covenants which prohibited a building such as that plan-

ned by the realtor herein. A temporary injunction was granted by Mr. Justice May on September 19, 1922, enjoining the relator herein from "doing any and all things in connection with the excavation, construction or erection of the apartment house planned to be erected by it as set forth in its plans filed with the Bureau of Buildings" and it further enjoined Albert E. Kleinert, as Superintendent of Buildings of the Borough of Brooklyn from "issuing a permit to the defendant, Rosevale Realty Company, Inc., for the construction of an apartment house in accordance with its plans as filed in the Bureau of Buildings." On October 20, 1922, Mr. Justice Lewis granted an injunction pendente lite continuing the injunction theretofore granted against the Rosevale Realty Company, Inc., said order being entered in the office of the Clerk of the County of Kings on the 21st day of October, 1922. A copy of the order to show cause of Mr. Justice May, dated September 19, 1922, of the summons, verified complaint and exhibits annexed thereto, of the affidavit of Pauline R. Kalvin, verified September 19, 1922, the affidavit of Gaston Koch, verified September 26, 1922, the affidavit of William H. Milnor, verified September 19, 1922, and my affidavit, verified [fol. 35] September 19, 1922, which were filed in behalf of the plaintiff in said action of Pauline R. Kalvin against Rosevale Realty Company, Inc., and Albert E. Kleinert, and the answer of the defendant Rosevale Realty Company, Inc., in said action are annexed hereto, marked Exhibit "A" and made a part hereof. A copy of said order of Mr. Justice Lewis in said action of Pauline R. Kalvin against Rosevale Realty Company, Inc., and Albert E. Kleinert is annexed hereto, and made a part hereof and marked Exhibit "B." Annexed hereto is also a copy of the Area District Map, Section 22, of the City of New York, including the said Midwood Manor section, showing said section as restricted under the Building Zone Law prior to the amendment of the resolution by the Board of Estimate and Apportionment, duly adopted on the 20th day of October, 1922, which resolution is referred to in paragraph designated "Tenth" of the complaint herein. Said Area District Map, Section 22, is marked Exhibit "C" and made a part hereof. The lines marked "X" on said exhibit indicate the extension of Zone E by said resolution of the Board of Estimate and Apportionment.

The entire Midwood Manor district is now devoted solely to one and two-family detached houses surrounded by shrubs and grass plots, Avenues I and J having park spaces in the center and along the walks. These park spaces are kept up by the Midwood Manor Association at considerable expense each year and four gardeners are employed by the Midwood Manor Association for such upkeep. The only business street in this section is Coney Island Avenue, and Avenues I, J and K for a depth of 25 feet west of Coney Island Avenue. These streets have been open to business uses for many years past.

[fol. 36] If the permit sought by the relator herein is granted it will cause irreparable damage to the residents of Midwood Manor and will greatly depreciate the value of their properties. Most of

the residents of Midwood Manor purchased their property by reason of the restricted character of the section and the fact that it was to be devoted to one and two family houses which were detached. The bringing of apartment houses into this section would be contrary to the general welfare of its residents and would endanger their health and safety, and an apartment house such as is intended to be constructed would cut off light and air and change the entire character of the neighborhood. These facts are more fully set forth in the proceedings had in the case of Pauline R. Kalvin against Rosevale Realty Company, Inc., and Albert E. Kleinert, which proceedings are annexed hereto and marked Exhibit "A" and made a part hereof, with the same force and effect as though fully set forth herein. It is not true as stated in the moving papers that the only reason assigned on the petition for the change of zone is the beauty of the neighborhood. Annexed hereto and marked Exhibit "D," which is made a part hereof, is a copy of the recitals contained in the said petition.

J. George Silberstein.

Sworn to before me this 13th day of February, 1923. Simon Gross, Notary Public, Bronx Co., No. 55. Bronx Register No. 136. Certificate filed New York County No. 104. New York Register No. 4156.

[fol. 37] **Exhibit "A" to Affidavit of J. George Silberstein**

SUPREME COURT, KINGS COUNTY

[Title omitted]

ORDER TO SHOW CAUSE

It appearing to my satisfaction by the annexed summons and complaint, verified September 19, 1922, the annexed affidavits of William H. Milnor, Gaston Koch, Pauline R. Kalvin and J. George Silberstein, verified September 19, 1922, that the plaintiff demands and is entitled to a judgment against the defendants, restraining the commission of the acts hereinafter enjoined as being in violation of the lawful restrictions placed upon the use of the property owned by the defendant, Rosevale Realty Company, Inc., and in violation of the rights of the plaintiff, the said defendant Rosevale Realty Company, Inc., its officers, agents and servants, are doing and threatening to do acts in violation of such rights which acts constitute a nuisance to the irreparable injury of the plaintiff, and that the commission of said acts during the pendency of such action will produce irreparable injury to the plaintiff and will tend to render the judgment in this action ineffectual, such acts consisting of the proposed erection of a six-story apartment house planned to be erected at the northeast corner of Avenue J and East 10th Street, in the Borough of Brooklyn, City of New York, and to cover a plot 100 feet frontage

[fol. 38] on said street and avenue and according to the plans as filed by the defendant, Rosevale Realty Company, Inc., the said apartment house is to be erected on the building lines of Avenue J and East 10th Street, respectively, in violation of lawful restrictions prohibiting the construction of buildings on the corner plot located at East 10th Street and Avenue J, requiring a 20-foot set back from the building lines on Avenue J and East 10th Street, which restrictions were duly imposed upon the premises owned by the defendant, Rosevale Realty Company, Inc., and

It further appearing to my satisfaction that the defendant, Rosevale Realty Company, Inc., has not submitted its plans and specifications for its proposed building as hereinabove set forth to the Greater New York Development Company, as required by the restrictions duly imposed upon the said defendant's premises, and

It further appearing to my satisfaction that the defendant, Albert E. Kleinert, as Superintendent of the Bureau of Buildings in the Borough of Brooklyn, City of New York, is about to issue a permit for the construction of the apartment house hereinbefore set forth, in violation of the rights of the plaintiff, and upon the ground that the acts of the defendants which are being done and threatened, constituting a private nuisance upon the plaintiff's premises, to the plaintiff's irreparable injury, and the plaintiff having given the security required by law, it is on motion of J. George Silberstein, Attorney for the Plaintiff

Ordered, that the defendants and each of them, show cause at a Special Term Part I of this Court, appointed to be held at the Kings County Court House, in the Borough of Brooklyn, City of New York, on the 21st day of September, 1922, at 10 o'clock in the forenoon, of that day, or as soon thereafter as counsel can be heard, "why [fol. 39] a rule or order should not be made," continuing the injunction herein granted during the pendency of this action, and why the plaintiff should not have such other further and different relief in the premises as may be just and proper, and it is further

Ordered, that pending the hearing and determination of this motion, the defendant, Rosevale Realty Company, Inc., its officers, agents, servants and employes, be and they hereby are enjoined and restrained until the further order of this Court, from doing any and all things in connection with the excavation, construction or erection of the apartment house planned to be erected by it, as set forth in its plans filed with the Bureau of Buildings, in the Borough of Brooklyn, New York City, on the 31st day of August, 1922, said plan being known as No. 15021, and it is further

Ordered, that the defendant, Albert E. Kleinert, as Superintendent of the Bureau of Buildings in the Borough of Brooklyn, City of New York, be and he hereby is enjoined and restrained until the further order of this Court, from issuing a permit to the defendant, Rosevale Realty Company, Inc., for the construction of an apartment house, in accordance with its plans, as filed in the said Bureau of Buildings, in the Borough of Brooklyn, City of New York, on August 31, 1922, said plan being known as No. 15021.

Let a copy of the summons and complaint and of the annexed

affidavits, together with copy of this order, be served upon the defendants not later than September 20th, 1922, and such services shall be sufficient.

Dated, Brooklyn, N. Y., September 19, 1922.

(Sgd.) Mitchell May, Justice of the Supreme Court, State of New York

[Title omitted]

[fol. 40] SUMMONS

To the above-named defendants and each of them:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance, on the Plaintiff's Attorney within twenty days after the service of this summons, exclusive of the day of service. In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated September 19, 1922.

J. George Silberstein, Attorney for Plaintiff, 120 Broadway, Borough of Manhattan, New York City.

[fol. 41] [Title omitted]

COMPLAINT

The plaintiff above named, by J. George Silberstein, her attorney, complains of the defendants and alleges:

First. Defendant, Rosevale Realty Company, Inc., is and at all the times hereinafter mentioned, subsequent to the first day of January, 1922, was a domestic corporation.

Second. Defendant, Albert E. Kleinert, is and at all the times hereinafter mentioned subsequent to the 31st day of August, 1922, was Superintendent of the Bureau of Buildings, in the Borough of Brooklyn, City of New York.

Third. That at all times hereinafter mentioned subsequent to the 10th day of July, 1920, plaintiff was and now is the owner and seized in fee and in possession of the following described premises:

"Beginning at the corner formed by the intersection of the North-
[fol. 42] erly side of Avenue J with the Westerly side of East Tenth Street; running thence Northerly along the Westerly side of East 10th day of July, 1920, plaintiff was and now is the owner and nue J, sixty feet; thence southerly parallel with East 10th Street, one hundred feet to the northerly side of Avenue J; and thence

easterly along the northerly side of Avenue J, sixty feet, to the corner, the point or place of beginning."

Fourth. That, by deeds recorded April 4, 1922, and April 13, 1922, respectively, the defendant Rosevale Realty Company, Inc., became and now is the owner and seized in fee and in possession of the following described properties:

"Beginning at the corner formed by the intersection of the northerly side of Avenue J with the easterly side of East Tenth Street as shown on said plan; running thence northerly along the said easterly side of East Tenth Street, one hundred (100) feet to the Southerly side of lot No. 6 on said plan; thence easterly along the southerly side of lot No. 6 and parallel with said Avenue J sixty (60) feet to the westerly side of lot No. 2 on said plan; thence southerly along the westerly side of lot No. 2 and parallel with said East Tenth Street, one hundred (100) feet to the northerly side of Avenue J, thence westerly along the said northerly side of Avenue J, sixty (60) feet, to the point or place of beginning.

"Beginning at a point on the northerly side of Avenue J distant sixty (60) feet easterly from the corner formed by the Intersection [fol. 43] of the northerly side of Avenue J with the easterly side of East 10th Street as shown on said plan, running thence Northerly parallel with said East 10th Street and along the easterly side of Lot No. 3 on said plan, one hundred (100) feet to the southerly side of No. 6 on said plan; thence easterly along the southerly side of Lot No. 6 and parallel with said Avenue J forty (40) feet to the center line of the block; thence southerly along said center line and parallel with said East 10th Street one hundred (100) feet to the northerly side of Avenue J; thence westerly along the said northerly side of Avenue J forty (40) feet, to the point or place of beginning."

Fifth. That the premises hereinbefore described are a part of and included in a large tract or parcel of land commonly known as Midwood Manor, the original map thereof having been filed in the Office of the Register of the County of Kings, on the 16th day of October, 1908, as Map No. 1457, and a copy of which is hereto annexed and marked "Exhibit A," and made a part hereof, which on the said 16th day of October, 1908, was owned in fee and in possession of the Greater New York Development Company.

Sixth. That the said Greater New York Development Company, then being the owner of the said large tract or parcel of land commonly known as Midwood Manor, in which is included the properties described in the paragraphs marked "Third" and "Fourth" herein, made and executed on the 20th day of March, 1922, and November 29th, 1911, deeds bearing date on said days, copies [fol. 44] whereof are hereunto annexed and marked "Exhibit B and C" and made a part hereof, in and by which the said Greater New York Development Company conveyed to Anna G. Fugate and to Edward Doran and Annie F. Doran, his wife, respectively, certain lots or pieces of land, among which were the parcels now owned by

Rosvale Realty Company, Inc., the defendant herein. That said deeds were on April 22, 1912, and December 9, 1911, respectively, duly recorded in the Office of the Register of the County of Kings, in Libers 3362 and 3343 of Conveyances, at pages 175 and 57, respectively. That in and by said deeds, the said Greater New York Development Company imposed the restrictions and limitations hereinafter set forth and more specifically set forth in Exhibit B and C hereto annexed.

Seventh. That thereafter by divers deeds of conveyance, the said Greater New York Development Company conveyed lots and pieces of land not of the said tract subject to the restrictions hereinbefore referred to, among which lots or pieces of land were the respective parcels now owned by plaintiff and defendant hereinbefore described. That by several mesne conveyances, plaintiff and defendant Rosevale Realty Company, Inc., became seized and possessed of their respective premises.

Eighth. That thereafter and on or about the 31st day of August, 1922, defendant Rosevale Realty Company, Inc., filed or caused to be filed in the Department of Buildings, Borough of Brooklyn, City of New York, plans for the constructions of a building six stories in height and to contain forty (40) families to be located at the northeast corner of East 10th Street and Avenue J, in the Borough of Brooklyn, City of New York, and to cover a plot 100 feet frontage [fol. 45] on said street and avenue, and according to said plans said building is intended to be erected on the building lines of Avenue J and East 10th Street, said plan is known as No. 15021.

Ninth. That the said plans and proposed buildings are in violation of the restrictions aforementioned, which require a twenty-foot set back on Avenue J and on East 10th Street, in the Borough and City aforesaid. That defendant Rosevale Realty Company, Inc., filed with said plans an application duly signed by its president asking that said plans be approved, and stating that it intended to erect upon the aforesaid premises owned by it a building in accordance with the said plan.

Tenth. That in and by said deeds of the Greater New York Development Company hereinbefore referred to, and marked Exhibits B and C, hereto annexed, there is among other restrictions contained therein and subject to which the properties of the plaintiff and the defendant Rosevale Realty Company, Inc., are held the following:

"No structure of any kind shall be erected or permitted upon said premises, or any part thereof, unless the plans and specifications for the same shall have been first submitted to and approved by said party of the first part. (Greater New York Development Company)"

Eleventh. Upon information and belief, defendant Rosevale Realty Company, Inc., failed and refused to submit the said plans aforesaid to the said Greater New York Development Company,

and plaintiff alleges upon information and belief that if the said plans of the defendant Rosevale Realty Company, Inc., herein were [fol. 46] submitted to the said Greater New York Development Company, said plans would not be approved by the said Greater New York Development Company, for good and sufficient reasons.

Twelfth. That defendant Rosevale Realty Company, Inc., has entered upon the work of constructing and erecting said buildings, and that upon information and belief it has contracted for the excavation of the ground therefor, and said defendant, Rosevale Realty Company, Inc., intends to proceed with the erection of said buildings upon its said premises according to its plans aforesaid.

Thirteenth. Upon information and belief the defendant Rosevale Realty Company, Inc., has instituted mandamus proceedings in the Supreme Court, Kings County, against the defendant Albert E. Kleinert, as Superintendent of the Bureau of Buildings, of the Borough of Brooklyn, City of New York, to compel said Kleinert to issue to it a permit to construct the building planned to be erected and constructed by it according to its plans referred to in paragraph "Eighth" hereof.

Fourteenth. That the construction and erection of a building in the manner such as the defendant Rosevale Realty Company, Inc., intends to construct and erect upon its said premises is in violation of the provisions of the agreement and deed hereinbefore set forth and in violation of the rights of the plaintiff.

Fifteenth. That upon plaintiff's said premises there is erected a one family dwelling house of two floors and attic and of great value, which is one of a large number of similar dwellings erected on said [fol. 47] street in said tract, known as Midwood Manor, and subject to the restrictions hereinbefore set forth.

Sixteenth. That plaintiff's said dwelling is of large rental value and desirable as residences but said rental value and desirability as residences, as well as the fee value, depend wholly upon the exclusion from the vicinity thereof, and especially from the block whereon the same is situated, of buildings prohibited by the provisions of the said deeds imposing the said restrictions, that is to say, the exclusion of all apartment houses in said Midwood Manor and for the exclusion of all buildings, not allowing for the prescribed 20 foot set back from the building line on Avenue J and East Tenth Street in said Midwood Manor.

Seventeenth. That plaintiff purchased said premises, relying upon said restrictions, and believing that by reason thereof said lot and tract would be free from buildings other than those permitted by the said deeds of the said Greater New York Development Company to its said grantees hereinbefore mentioned and described in paragraph "Sixth" hereof, and its other grantees, the names of whom your deponent has no knowledge of at the present time.

Eighteenth. Plaintiff is a member of the Midwood Manor Association, an unincorporated association, organized by the residents of Midwood Manor for the purpose of the general welfare of its members. Upon information and belief a petition has been filed by the members of the said Midwood Manor Association with the Board of Estimate and Apportionment, requesting that the zone of the territory located on East 10th Street, between the Long Island Railroad Cut [fol. 48] and Avenue K, in the Borough of Brooklyn, City of New York, be changed from the C Zone to the E Zone.

Nineteenth. Upon information and belief that the said Association has prepared agreements to continue the restrictions imposed upon the property located in said Midwood Manor and upon information and belief the said agreements have been distributed among the property owners in said Midwood Manor for execution.

Twentieth. Upon information and belief the members of the said Midwood Manor Association have undertaken to file a petition with the Board of Estimate and Apportionment requesting that the corner plot located on Avenues I, J, and K and Coney Island Avenue which are now in the C Zone, be changed as to use so as to permit the erection of buildings for business purposes on said plots, with stores facing and having their entrances on said Coney Island Avenue only, and not on said Avenues I, J and K.

Twenty-first. That plaintiffs have no adequate remedy at law for the reason that the injury that will be done to them if the defendant Kleinert issue a permit and the defendant Rosevale Realty Company, Inc., proceed with the erection of its proposed building for apartment house, and in failing to allow for the required 20 foot set back, cannot be compensated in money.

Wherefore, plaintiff demands judgment that the defendant Rosevale Realty Co., Inc., its officers, agents and employees, and all persons holding under it or aiding or assisting it be permanently and perpetually enjoined and restrained from constructing or erecting upon its said premises the building now being or intended to be erected by it according to its plans as filed or any buildings other [fol. 49] than the kind permitted by the said deeds hereinbefore described, of the Greater New York Development Company to Anna G. Fugate and to Edward Doran and Annie F. Doran, his wife, and that the defendant Albert E. Kleinert, as Superintendent of the Bureau of Buildings in the Borough of Brooklyn, City of New York, be permanently and perpetually enjoined from issuing a permit to the Rosevale Realty Company, Inc. for the construction of an apartment house, in accordance with its plans as filed in the said Bureau of Buildings in the Borough of Brooklyn, City of New York, on August 31st, 1922, said plan being known as No. 15021; and that the plaintiff have such other and further relief as may be just and proper in the premises.

J. George Silberstein, Office & Post Office Address, No. 120 Broadway, Borough of Manhattan, New York City.

(Verified September 19th, 1922.)

Exhibit "A"

(This is a Map of Midwood Manor. See Stipulation Printed Page 77 hereof Midwood Manor.)

Exhibit "B" to Complaint

This indenture, made the twentieth day of March, in the year one thousand nine hundred and twelve by and between Greater New York Development Company, a corporation duly organized and existing under and by virtue of the Laws of the State of New York, party of the first part, and Anna G. Fugate, residing at No. 1707 [fol. 50] Fourteenth Street, Altoona, Pennsylvania, party of the second part;

Witnesseth: that the said party of the first part, in consideration of the sum of one dollar, lawful money of the United States, and other valuable considerations, paid by the party of the second part, does hereby grant and release unto the said party of the second part, heirs, and assigns forever, all its right, title and interest in and to all that certain piece or parcel of land situate, lying and being in the Borough of Brooklyn, of the City of New York, County of Kings, and State of New York, known and designated as lots Nos. 3, 4 and 5 in Block 6523 on a certain plan of lots called "Midwood Manor," surveyed for Greater New York Development Company, by Fred L. Bartlett, Civil Engineer and City Surveyor, 1908, and filed or intended to be filed in the Register's Office of Kings County aforesaid October 16th, 1908, as Map No. 1457 bounded and described as follows:

Beginning at the corner formed by the intersection of the Northerly side of Avenue J with the Easterly side of East Tenth Street as shown on said plan; running thence northerly along the said Easterly side of East Tenth Street, one hundred (100) feet to the Southerly side of Lot No. 6 on said plan; thence Easterly along the Southerly side of Lot No. 6 and parallel with said Avenue J sixty (60) feet to the Westerly side of Lot No. 2 on said plan; thence Southerly along the Westerly side of Lot No. 2 and parallel with said East Tenth Street, one hundred (100) feet to the Northerly side of Avenue J; thence Westerly along the said Northerly side of Avenue J sixty [fol. 51] (60) feet, to the point or place of beginning be said measurements and area more or less.

Together with the appurtenances and all the estate and rights of the party of the first part in and to said premises.

To have and to hold the above-granted premises unto the said party of the second part, her heirs and assigns forever; subject to easements for the erection and maintenance of telephone and electric light poles, and installation of subsidiary pipes, wires and cables extending from subways, in, over, through, under and upon the

center line of all blocks now or hereafter laid out at Midwood Manor, and an easement to construct or install underground conduits or cables along property lines at such points as are necessary to reach the streets for the purpose of supplying street lights.

And the said party of the second part, for herself, her heirs, executors, administrators and assigns, do hereby covenant and agree to and with the said party of the first part, its successors and assigns, as follows: that neither said party of the second part, her heirs or assigns will erect or permit on any part of the herein-described premises any buildings except a detached dwelling house, except as hereinafter provided and no such dwelling house shall be built for use and occupancy of more than one family, and shall cost not less than six thousand ($6,000.00) dollars, if built for use and occupancy of one family only; all buildings hereinbefore described shall be not less than two stories in height, shall have a cellar, shall not have what is commonly known as a flat-roof, nor shall any part of any building, excepting steps, piazzas, bay or oriel windows, and other [fol. 52] usual projections appurtenant thereto be erected or maintained upon any part of said premises within twenty (20) feet of the line of Avenue J, nor within twenty (20) feet of the line of East 10th Street, excepting, however, such garage as is appurtenant to a private residence, which garage, if erected must stand at least seventy (70) feet from Avenue J and at least forty (40) feet from East 10th Street, nor shall more than one such dwelling house and one such garage be erected or permitted on each parcel of land sixty feet in width by one hundred feet in depth, nor shall any fence be built, constructed or maintained on any part of said premises unless the nature, kind, shape, material and location be first made known and shown to one of the officers of said Greater New York Development Company, and have received his sanction and approval in writing, nor shall there be built on said premises or any part thereof, any building for the use or purpose of, or to be used as a brewery, distillery, slaughter-house, smith shop, carpenter shop, forge or furnance, steam engine, brass foundry, tin, nail or other iron foundry, soap, candle, starch, varnish, vitrol, glue, ink, turpentine oil, lamp black or bone factory, nor any manufactory for the manufacture or making of gunpowder, or any bone-boiling establishment, or factory for tanning, dressing or preparing skins, hides or leather; cow stable, horse stable, livery or milkman's stable, cattle yard, hog pen or hennery, nor any building for the carrying on of any noxious or dangerous trade or business, nor any building for the storing, keeping or maintaining any fire-engine or truck or hose-carriage, nor any hospital, and that the party of the second part will not use or permit to be used the said premises or any part thereof for the use or carry- [fol. 53] ing on of any trade or business.

And the party of the second part for herself, her heirs, executors, administrators and assigns, does hereby further covenant and agree to and with the said party of the first part, its successors and assigns, that neither the said party of the second part nor her heirs, executors, administrators or assigns, will sell or suffer, or allow to be

sold on the premises hereby conveyed, or any part thereof, any strong or spirituous liquors, or ale beer or wine, or intoxicating liquors of any kind. The party of the first part, however, shall have the right to erect or maintain or permit to be erected or maintained on the lots in Blocks 6509, 6519, 6527 and 6532 of Midwood Manor, barns or stables for horses appurtenant to private residences; and the party of the first part shall also have the right to use and grant the right to use for all purposes other than those business purposes specifically mentioned above, all of the lots on Coney Island Avenue. No structure of any kind shall be erected or permitted upon said premises, or any part thereof, unless the plans and specifications for the same shall have been first submitted to and approved by said party of the first part.

All the restrictions and covenants in this instrument contained shall continue in force until the first day of January, 1923, and no longer. Except that all lots on Ocean Parkway are subject to the restrictions imposed by Chapter 861 of the Laws of 1869 and the acts amendatory thereof and supplemental thereto and to any regulations established by the Park Commissioners pursuant thereto.

And the said party of the first part does hereby covenant with the said party of the second part that the party of the first part has not [fol. 54] done or suffered anything whereby the said premises have been, encumbered in any way whatever excepting as to said restrictions, limitations and easements.

In Witness Whereof, Greater New York Development Company, the said party of the first part has caused its corporate name to be hereunto subscribed by its Vice-President and its corporate seal to be hereunto affixed, attested by its Secretary-Treasurer the day and year first above written.

Greater New York Development Company, by R. T. Paine, 2nd, Vice-President. (Seal.)

Attest: R. T. Paine, Secretary-Treasurer.
Witness: A. A. Way.

Commonwealth of Massachusetts,
County of Suffolk, ss:

On the 21st day of March, in the year one thousand nine hundred and twelve before me personally came R. T. Paine, 2nd, to me known who being by me duly sworn did depose and say, that he resides in the Town of Brookline, Massachusetts, and that he is the Vice-President of Greater New York Development Company, the corporation described in and which executed the above instrument; that he knew the seal of the said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation; and that he signed his name thereto by like order.

Archie A. Way, Notary Public.

Notarial Certificate of Francis A. Campbell, of Boston, Clerk of Supreme Court, attached.

[fol. 55] EXHIBIT "C" TO COMPLAINT

This indenture, made the twenty-ninth day of November, in the year one thousand nine hundred and eleven by and between Greater New York Developing Company, a corporation duly organized and existing under and by virtue of the Laws of the State of New York, party of the first part, and Edward Doran and Annie F. Doran, his wife, both residing at No. 476 Hudson Street, Borough of Manhattan City and State of New York, parties of the second part;

Witnesseth, That the said party of the first part, in consideration of the sum of one dollar, lawful money of the United States, and other valuable considerations, paid by the parties of the second part, does hereby grant and release unto the said parties of the second part, their heirs, and assigns, forever, all its right, title and interest in and to all that certain piece or parcel of land situate, lying and being in the Borough of Brooklyn, of the City of New York, County of Kings, and State of New York, known and designated as lot No. 1 and 2 in Block 6523 on a certain plan of lots called "Midwood Manor," surveyed for Greater New York Developing Company, by Fred L. Bartlett, Civil Engineer and City Surveyor, 1908, and filed in the Register's Office of Kings County aforesaid, October 16th, 1908, as Map No. 1457 bounded and described as follows:

Beginning at a point on the Northerly side of Avenue J distant sixty (60) feet Easterly from the corner formed by the intersection of the Northerly side of Avenue J with the Easterly side of East 10th [fol. 56] Street as shown on said plan, running thence Northerly parallel with the said East 10th Street and along the Easterly side of Lot No. 3 on said plan one hundred (100) feet to the Southerly side of No. 6 on said plan; thence Easterly along the Southerly side of Lot No. 6 and parallel with said Avenue J forty (40) feet to the center line of the block, thence Southerly along said center line and parallel with said East Tenth Street, one hundred (100) feet to the Northerly side of Avenue J; thence Westerly along the said Northerly side of Avenue J forty (40) feet to the point or place of beginning be said measurements and area more or less.

Together with the appurtenances and all the estate and rights of the party of the first part in and to said premises.

To have and to hold the above-granted premises unto the said part- of the second part, their heirs and assigns forever subject to easements for the erection and maintenance of telephone and electric light poles, and installation of subsidiary pipes, wires and cables extending from subways, in, over, through, under and upon the center line of all blocks now or hereafter laid out at Midwood Manor, and an easement to construct or install underground conduits or cables along property lines at such points as are necessary to reach the streets for the purpose of supplying street lights.

And the said parties of the second part, for their heirs, executors, administrators and assigns, do hereby covenant and agree to and with the said party of the first part, its successors and assigns, as fol- [fol. 57] lows: that neither said parties of the second part, their heirs

or assigns will erect or permit on any part of the herein-described premises any building except a detached dwelling house, except as hereinafter provided, and no such dwelling house shall be built for use and occupancy of more than one family, and shall cost not less than Six Thousand ($6,000) dollars, if built for use and occupancy of one family only; all buildings hereinbefore described shall be not less than two stories in height, shall have a cellar, shall not have what is commonly known as a flat-roof, nor shall any part of any building, excepting steps, piazzas, bay or oriel windows, and other usual projections appurtenant thereto be erected or maintained upon any part of said premises within twenty (20) feet of the line of Avenue J however, such garage as is appurtenant to a private residence, which garage, if erected must stand at least seventy (70) feet from Avenue J and at least forty (40) feet from East Tenth Street, nor shall more than one such dwelling house and one such garage be erected of permitted on each parcel of land forty feet in width by one hundred feet in depth, nor shall any fence be built, constructed or maintained on any part of said premises unless the nature, kind, shape, material and location be first made known and shown to one of the officers of the said Greater New York Development Company, and have received his sanction and approval in writing, nor shall there be built on said premises or any part thereof, any building for the use or purpose of, or to be used as a brewery, distillery, slaughter-house, smith shop, carpenter shop, forge of furnace, steam engine, brass foundry, tin, nail [fol. 58] or other iron foundry, soap, candle, starch, varnish, vitriol, glue, ink, turpentine oil, lamp black or bone factory nor any manufactory for the manufacture or making of gunpowder, or any bone-boiling establishment, or factory for tanning, dressing or preparing skins, hides or leather; cow stable, horse stable, livery or milkman's stable, cattle yard, hogpen or hennery, nor any building for the carrying on of any noxious or dangerous trade or business, nor any building for the storing, keeping or maintaining any fire-engine or truck or hose-carriage nor any hospital, and that the party of the second part will not use or permit to be used the said premises or any part thereof for the use or carrying on of any trade or business.

And the parties of the second part for themselves, their heirs, executors, administrators and assigns, do hereby further covenant and agree to and with the said party of the first part, its successors and assigns, that neither the said parties of the second part nor their heirs, executors, administrators or assigns will sell or suffer, or allow to be sold on the premises hereby conveyed, or any part thereof, any strong or spirituous liquors, or ale, beer or wine, or intoxicating liquors of any kind. The party of the first part, however, shall have the right to erect or maintain or permit to be erected or maintained on the lots in Blocks, 6509, 6519, 6527 and 6532 of Midwood Manor, barns or stables for horses appurtenant to private residences; and the party of the first part shall also have the right to use and grant the right to use for all purposes other than those business purposes specifically mentioned above, all of the lots on Coney Island Avenue. No structure of any kind shall be erected or permitted upon said [fol. 59] premises, or any part thereof, unless the plans and specifi-

cations for the same shall have been first submitted to and approved by said party of the first part.

All the restrictions and covenants in this instrument contained shall continue in force until the first day of January, 1923, and no longer. Except that all lots on Ocean Parkway are subject to the restrictions imposed by Chapter 861 of the Laws of 1869 and the acts amendatory thereof and supplemental thereto and to any regulations established by the Park Commissioners pursuant thereto.

And the said party of the first part does hereby covenant with the said parties of the second part that the party of the first part has not done or suffered anything whereby the said premises have been encumbered in any way whatever excepting as to said restrictions, limitations and easements.

In witness whereof, Greater New York Development Company, the said party of the first part has caused its corporate name to be hereunto subscribed by its Vice-President and its corporate seal to be hereunto affixed, attested by its Secretary-Treasurer the day and year first above written.

Greater New York Development Company, by Arthur Lyman, Vice-President. (Seal.)

Attest: R. T. Paine, 2d, Secretary-Treasurer.
Witness: A. A. Way.

COMMONWEALTH OF MASSACHUSETTS,
County of Suffolk, ss:

On the 1st day of December, in the year one thousand nine hun- [fol. 60] dred and eleven before me personally came Arthur Lyman to me known who being by me duly sworn did depose and say that he resides in the City of Waltham, Massachusetts, and that he is the Vice-President of Greater New York Development Company, the corporation described in and which executed the above instrument; that he knew the seal of the said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation; and that he signed his name thereto by like order.

Archie A. Way, Notary Public. (L. S.)

Notarial certificate.

AFFIDAVIT OF PAULINE R. KALVIN

[Title omitted]

Pauline R. Kalvin, being duly sworn, deposes and says:

I am the plaintiff in the above entitled action, and reside at No. 919 Avenue J. As set forth in the complaint hereto annexed, I am [fol. 61] informed and verily believe that the defendant Rosevale Realty Company, Inc. has filed plans in the office of the Bureau of Buildings in the Borough of Brooklyn, City of New York, for the

proposed construction of an apartment house at the corner plot on Avenue J and East Tenth Street. Said corner plot is directly opposite the premises owned by me.

That unless the defendant Rosevale Realty Company, Inc., is restrained from proceeding with the erection of said apartment house, it will cause me irreparable injury. Upon information and belief the defendant is not able to answer in damages to me for any damage that I might sustain. The source of my information and grounds of my belief are the affidavit of Gaston Koch hereto annexed, sworn to September 19th, 1922, and I refer to same with the same force and effect as though the said affidavit was herein set forth in full and I do hereby make the same a part hereof.

This action is about to be begun by the issuance of a summons. My attorney is J. George Silberstein, whose office and post address is 120 Broadway, Borough of Manhattan, New York City.

No previous application has been made to any Court or Judge for a temporary injunction herein, or for an order to show cause.

The next Term at which this case can be heard is appointed to be held in the County of Kings, on the first Monday of November, 1922.

Wherefore, deponent prays that the order to show cause hereto annexed be issued.

(Sgd.) Pauline R. Kalvin.

Sworn to before me this 19th day of September, 1922. Raphael Brill, Notary Public, No. 300, New York County; New York Register's No. 4032; Commission expires Mar. 30, 1924.

[fol. 62] AFFIDAVIT OF GASTON KOCH

[Title omitted]

STATE OF NEW YORK,
County of New York, ss:

GASTON KOCH, being duly sworn, deposes and says:

That he resides at 1078 East 9th Street, in the Borough of Brooklyn, City of New York. That he is the President of an Association formed by the residents of that parcel or tract of land which is commonly known as Midwood Manor and which Association is called the Midwood Manor Association, and in said Association there are approximately 350 paid members, and that said Midwood Manor there are approximately 600 homes. That the homes already erected and constructed in said Midwood Manor are of either one family or two family houses. That either one or two family houses are only permitted to be built on the property located North of Avenue I on 7th, 8th and 9th Streets and at East 10th Street between Long Island [fol. 63] Railroad cut and Avenue K. That on Ocean Parkway, East 7th, East 8th and East 9th Street, between Avenues I and J and

Avenue K, one family houses only are permitted to be constructed. That the character of buildings in said Manor is high class, and that the value of the homes in said Manor range between $14,000 and $80,000. That since the commencement of the construction of the buildings aforesaid, as set forth in the Complaint, copy of which is hereto annexed, there has been a wave of protest coming from all the residents of said Manor and as your deponent is informed and verily believes, the rest of the property owners of said Midwood Manor purchased the property owned by them upon the understanding that the property located within the area of Midwood Manor was restricted, and that, furthermore, no buildings could be erected within the said Midwood Manor for apartment houses for the reason that it would be impractical to erect apartment houses on the said lot in view of the set-back hereinafter set forth; and that any building erected on the North-east corner of East 10th Street and Avenue J was subject to a 20-foot set back.

That Midwood Manor is considered one of the show places in Flatbush and has as its entrance a beautiful brick gateway and flowers and shrubbery and plants of many species. That in the center of Avenue J between Coney Island Avenue and Ocean Parkway, the center of the street is parked with beautiful trees, flowers and shrubbery. That the Midwood Manor Association has invested large sums of money in the upkeep of this property and at the present time is employing four gard-ners to look after the said parks. [fol. 64] Deponent refers to Exhibit A annexed to the Complaint and specifically refers to that portion thereof headed, "General Restrictions" and refers to paragraphs thereof marked Fifth and Sixth. That deponent has examined the plans filed by the defendant herein with the Building Department in the Borough of Brooklyn, City of New York, on the 31st day of August, 1922, said plans are known as No. 15021, and to the best of deponent's knowledge such plans do not show any set-back on East 10th Street and on Avenue J as required by the restrictions imposed upon properties located in Midwood Manor.

That the construction of the proposed building by defendant according to the said plans filed as aforesaid unless enjoined and restrained will cause the property located within the said Midwood Manor to depriciate greatly in value and that the residents thereof will suffer irreparable damage unless the defendant's proposed construction is restrained by this Court.

That heretofore in the regular course of the business of the said association, the association has undertaken to draw up an agreement to be submitted to the respective property owners within Midwood Manor, wherein the property owners agree to continue the restrictions imposed upon the property located in Midwood Manor for another period of fifteen years. That the said agreement has been submitted to title companies for approval as to form and that such approval has been obtained. That the forms of said agreement have been printed and are being circulated amongst the various block captains for signatures by the respective property owners and the mortgagees, if any, of property located in Midwood Manor.

[fol. 65] That upon information and belief a petition has been filed with the Board of Estimate and Apportionment petitioning that the territory located on East 10th Street between the Long Island Railroad cut and Avenue K, be changed from the C Zone to the E Zone, which in effect means that whereas this territory now being in the C Zone permits of the construction of apartment houses, by changing it to E Zone, which requires that only 50 per cent of the land can be utilized in the construction of a building up to 18 feet above the ground and then 30 per cent of the area above 18 feet. This will make it commercially impractical for the construction of apartment houses.

That the purpose of filing this petition was to carry out the general scheme in the lay-out of the tract of land which is known as Midwood Manor, so that the property will be restricted to only one and two family houses.

That, upon information and belief, the defendant is financially irresponsible and unable to respond to the plaintiff as well as the other property owners in the said Midwood Manor in damages for the loss in value certain to be caused if the defendant's plans should be permitted to continue, and that a multiplicity of actions will arise by reason thereof. The sources of deponent's knowledge and the grounds of his belief as to the defendant's financial irresponsibility to respond for damages is an examination made by deponent of the corporation directory made by deponent of the corporation directory edited by R. L. Polk & Co., for the year 1922, wherein it is stated in effect that the capital of the defendant is $5,000.

[fol. 66] Wherefore, deponent prays that this court issue a temporary injunction restraining the defendant from continuing the construction of the buildings set forth in its plans hereinbefore mentioned, and that an order to show cause issue why the temporary injunction herein prayed for should not be continued pendente lite. An order to show cause returnable in less than eight days is asked for by reason of the urgency of the matter.

This action is about to be begun by the issuance of a summons. The attorney for the plaintiff is J. George Silberstein, whose office and post office address is 120 Broadway, Borough of Manhattan, New York City.

Upon information and belief, no previous application has been made to any court or judge for a temporary injunction herein or for an order to show cause.

That the sources of my information and the grounds of my belief are conversations had with the plaintiff.

That the next term at which this cause can be tried is appointed to be held in the County of Kings on the 1st Monday of November, 1922.

(Sgd.) Gaston Koch

Sworn to before me this 26th day of September, 1922. Raphael Brill, Notary Public, No. 300, New York County; New York Register's No. 4032; Commission expires Mar. 30, 1924.

[fol. 67] AFFIDAVIT OF WILLIAM H. MILNOR

[Title omitted]

STATE OF NEW YORK,
County of New York, ss:

William H. Milnor, being duly sworn, deposes and says:

That he is the Secretary of Greater New York Development Company, a domestic corporation, having its principal place of business at No. 261 Broadway, New York City, and that he has been Secretary of such corporation for some years.

That said Greater New York Development Company was the owner of a tract of land located in the Borough of Brooklyn, New York City, bounded on the East by Coney Island Avenue; on the West by Ocean Parkway; on the North by Long Island Railroad and land of other owners and on the South by Avenue K, which tract of land was acquired by the corporation by deed from Bertha M. Campbell, dated June 15th, 1904;

That at the time said tract was acquired by the corporation the same was undeveloped, no streets of any kind having been cut through the property, or any other improvements;

[fol. 68] That the Greater New York Development Company opened streets through said tract, laid sidewalks, curb and installed sewers, water, gas and then offered said property for sale with restrictions as more fully set forth on a map of said property, a copy of which is hereto annexed to the complaint and marked Exhibit A, said property being designated by the Greater New York Development Company as Midwood Manor;

That in all conveyances made by the Greater New York Development Company of property in said Midwood Manor, covenants and restrictions were imposed in accordance with the map and all deeds contained the further provision, "no structure of any kind shall be erected or permitted upon said premises, or any part thereof, unless the plans and specifications for same shall have been first submitted to and approved by said party of the first part," the said party of the first part referred to being the Greater New York Development Company in all instances;

That deponent has been informed Rosevale Realty Co., Inc., has filed plans for the erection of a six-story apartment house to be located at the northeast corner of East 10th Street and Avenue J, in the Borough of Brooklyn, City of New York, and to cover a plot 100 feet frontage on each street each said building is to contain approximately forty apartments and according to said plans said building is to be erected on the building lines of Avenue J and East 10th Street, respectively;

That the premises located at the northeast corner of Avenue J and East 10th Street were originally part of the tract owned by Greater New York Development Company and were conveyed by Greater New York Development Company with restrictions as will [fol. 69] more fully appear by the deed annexed to the complaint and marked Exhibit B, among which restrictions is contained the

proviso "no structure of any kind shall be erected or permitted upon said premises, or any part thereof, unless the plans and specifications for same shall have been first submitted to and approved by said party of the first part";

That the plans and specifications for said building to be erected by the defendant on premises at the Northeast corner of East 10th Street and Avenue J have not been submitted to the Greater New York Development Company for its approval to the best of deponent's knowledge, information and belief;

That deponent is in touch with all of the affairs of the Greater New York Development Company and would be the one in the absence of William E. Harmon, the President of deponent's company to approve such plans if they had been submitted; that William E. Harmon is now and for some time past has been in Europe.

Deponent further says that if said plans had been submitted they would not have been approved by reason of the fact that they do not show that the defendant intends to set the buildings back twenty feet from the line of Avenue J and East Tenth Street as provided by the covenants and restrictions imposed by Greater New York Development Company.

(Sgd.) Wm. H. Milnor.

Sworn to before me this 19th day of September, 1922. Elizabeth Roth, Notary Public, New York County; Clerk's No. 195, etc.

[fol. 70] AFFIDAVIT OF J. GEORGE SILBERSTEIN

[Title omitted]

J. George Silberstein, being duly sworn, says:

I am an attorney and counsellor at law, with offices at 120 Broadway, Borough of Manhattan, New York City. I am informed and verily believe that the defendant Rosevale Realty Company, Inc., has filed plans to erect and construct an apartment house on the corner plot on Avenue J and East Tenth Street, in the Borough of Brooklyn, New York City, in violation of certain restrictions more fully set forth in Exhibits B and C annexed to the complaint herein, to which I hereby refer.

I beg leave to submit upon the argument herein, photographs showing the location and surrounding territory of the corner plot on Avenue J and East Tenth Street.

I am informed and believe that the defendant Rosevale Realty Company, Inc., has instituted mandamus proceedings to compel the defendant Kleinert as Superintendent of the Bureau of Buildings in [fol. 71 the Borough of Brooklyn, City of New York, to issue a permit for the construction of the building in accordance with its plans as filed. The source of my information and the grounds of my belief are conversations had with Assistant Corporation Counsel Reilly, who is in charge of the said mandamus proceedings, in be-

half of Mr. Kleinert. The motion for the mandamus will be heard in Special Term, Part I, tomorrow, September 20th, 1922, at ten a. m. and from statements made to me by Mr. Reilly, he believes that the mandamus will be granted.

In the event that the mandamus is granted and a permit issued allowing the defendant Rosevale Realty Company, Inc., to construct its buildings according to its plans, it will, in my opinion cause the plaintiff herein irreparable injury.

I therefore request that an order to show cause issue restraining the defendants from doing any act which will in any way lend aid to the construction of the said apartment house, and I further request that a preliminary injunction be allowed for the reason that otherwise, in my opinion, the plaintiff may suffer irreparable injury.

(Sgd.) J. George Silberstein.

Sworn to before me this 19th day of September, 1922. Raphael Brill, Notary Public, No. 300, New York County; New York Register's No. 4032; Commission expires Mar. 30, 1924.

[fol. 72] Exhibit "B" to Affidavit of J. George Silberstein

At a special term of the Supreme Court, Part I, thereof, held in and for the County of Kings, at the County court-house, in the borough of Brooklyn, city of New York, on the 20th day of October, 1922.

Present: Hon. Harry E. Lewis, Justice.

Pauline R. Kalvin, Plaintiff,

against

Rosevale Realty Company, Inc., and Albert E. Kleinert, as Superintendent of the Bureau of Buildings of the Borough of Brooklyn, City of New York, Defendants

Judgment

The plaintiff, having duly made a motion for a temporary injunction, pending the final determination of the above entitled action, upon the ground that the defendants are doing, or procuring or suffering to be done, and threaten or are about to do or perform, or suffer to be done, acts in violation of the plaintiff's rights, respecting the subject matter of this action.

Now, on reading and filing the order to show cause herein, made by Mr. Justice May, dated September 19, 1922, the summons and complaint herein, together with the exhibits thereto annexed; the [fol. 73] affidavit of Pauline R. Kalvin, sworn to September 19, 1922; the affidavit of Gaston Koch, sworn to September 26, 1922; the affidavit of William H. Milnor, sworn to September 19, 1922; the affidavit of J. George Silberstein, sworn to September 19, 1922;

EXHIBIT "C"

21 H-2000-17 C

CITY OF NEW YORK

BOARD OF ESTIMATE AND APPORTIONMENT 75

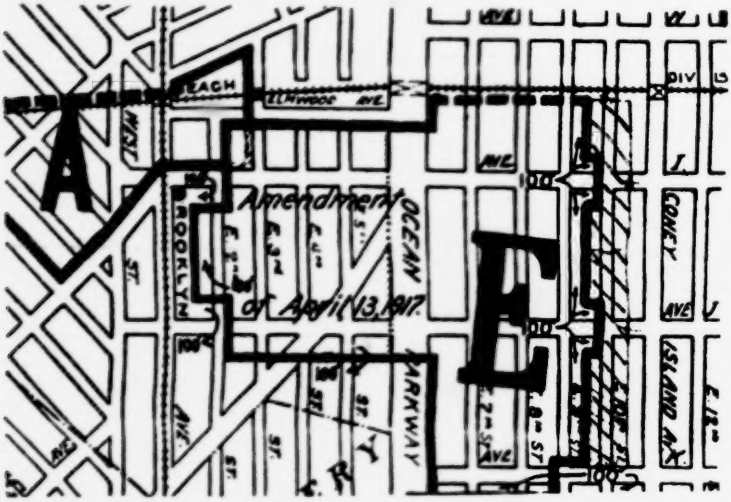
BUILDING ZONE AMENDMENT

(Adopted April 13, 1917)

Amendment No. 13 **Area District Map Section No. 22**

At a meeting of the Board of Estimate and Apportionment on April 13, 1917, the following resolution was adopted:

Resolved by the Board of Estimate and Apportionment that the resolution entitled: "A resolution regulating and limiting the height and bulk of buildings hereafter erected and regulating and determining the area of yards, courts and other open spaces, and regulating and restricting the location of trades and industries and the location of buildings designed for specified uses and establishing the boundaries of districts for the said purposes," adopted July 25, 1916, be and is hereby amended by changing Area District Map Section No. 22 so as to include within an E district the area bounded as follows: Beginning at the southeasterly corner of Elmwood Avenue and East 2nd Street: thence easterly along the south side of Elmwood Avenue to the west side of Ocean Parkway: thence southerly along the west side of Ocean Parkway to a point 100 feet southerly from Avenue J measured along said Parkway: thence westerly parallel with Avenue J to East 2nd Street: thence northerly along the easterly side of East 2nd Street to a point 100 feet northerly from Avenue J measured along said street: thence westerly parallel to Avenue J to a point 100 feet westerly from East 2nd Street measured along said parallel: thence northerly parallel with East 2nd Street to a point 100 feet southerly from Avenue I measured along said parallel to East 2nd Street: thence easterly parallel with Avenue I to the easterly side of East 2nd Street: thence northerly along the easterly side of East 2nd Street to the place of beginning, Borough of Brooklyn.



Amendment of Area District Map Section 22, adopted April 13, 1917.

Fine dotted lines indicate boundaries of the area changed.

This notice should be attached to copies of Area District Map Section 22, for ready reference or the above map may be pasted in its proper position on copies of such section.

the affidavit of Gaston Koch, sworn to September 26, 1922, and photographs marked "A," "B," "C," "D," "E" and "F" and copy petition to Board of Estimate & Apportionment, submitted in support of said motion; and upon reading and filing the two affidavits of Lazarus Rosenberg, sworn to September 22nd and 26th, 1922, respectively; the answer of the defendant Rosevale Realty Company, Inc., verified September 22, 1922, in opposition thereto; and the two undertakings for $250 each heretofore given herein; and upon reading and filing the opinion of the Court herein; and after hearing J. George Silberstein, Esq., of counsel for the plaintiffs in support of said motion, Aaron William Levy, of counsel for the Midwood Manor Association, amicus curiae, in support of said motion, and Hugo Hirsh of counsel for the defendant Rosevale Realty Company in opposition thereto, and Joseph Reilly, of counsel for the defendant Albert E. Kleinert, and on motion of J. George Silberstein, attorney for the plaintiff, it is hereby

Ordered, that the defendant Rosevale Realty Company, Inc., its officers, agents and servants, and each of them, be and they hereby are enjoined and restrained during the pendency of this action, and for a period of time expiring on January 1st, 1923, in the event this action be not tried and finally disposed of prior to that date, [fol. 74] from doing either directly or indirectly, any and all things in connection with the excavation, construction or erection of buildings planned to be constructed and erected by it, as set forth in its plans, filed in the office of the Bureau of Buildings, in the Borough of Brooklyn, City of New York, on the 31st day of August, 1922, said plan being known as No. 15021; it is

Further ordered, that the defendant Rosevale Realty Company, Inc., pay to the plaintiff ten ($10.00) dollars, as motion costs herein, and it is

Further ordered, that the motion be and hereby is in all other respects denied.

Enter,

Lewis, J. S. C.

Granted Oct. 20, 1922. William E. Kelly, Clerk.

[fol. 75] EXHIBIT "C" TO AFFIDAVIT OF J. GEORGE SILBERSTEIN

(Here follows reproduction of Exhibit "C," marked side folio page 75½)

[fol. 76] EXHIBIT "D" TO AFFIDAVIT OF J. GEORGE SILBERSTEIN

Whereas, East 10th Street in Midwood Manor, Brooklyn, has for the past 15 years been adorned with beautiful homes and said street is one of the prominent thoroughfare- of Midwood Manor, and is picturesque because of its trees, flowers and shrubbery, and whereas, Midwood Manor Association spends yearly a large sum of money in the upkeep of said street, said Association employing 4 gardeners

to look after the trees, flowers, grass and shrubbery, and whereas, the present Midwood Manor restrictions prohibit apartment houses on said 10th St., but said restrictions expire January 1st, 1923, and whereas, on account of the present zoning law, it will be possible after January 1st, 1923, to erect apartments on certain lots in East 10th St., in said Manor, thereby spoiling the beauty and desirability of E. 10th St., as residential street in said Manor, and depreciating greatly the values of the houses on said 10th St., and causing immeasurable damage to the other costly homes in Midwood Manor.

We, the undersigned, being the owners of fifty percent or more of the frontage on East Tenth Street, between what is known as the Long Island Cut and Ave. K, Brooklyn, New York, hereby respectfully petition that said Tenth St., between Long Island Cut and Ave. K, be placed wholly in the E District or zone.

[fol. 77] IN SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK ex Rel. ROSEVALE CO., INC., Plaintiff, Appellant,

against

ALBERT E. KLEINERT, as Superintendent of the Bureau of Buildings of the Borough of Brooklyn, City of New York, Defendant, Respondent

STIPULATION TO OMIT MAP OF MIDWOOD MANOR IN PRINTING

It is hereby consented and agreed, by and between the attorneys for the respective parties hereto that the map of Midwood Manor which was used as an exhibit herein in opposition to this motion and was annexed as an exhibit to the complaint of Pauline R. Kalvin against Albert E. Kleinert, etc., and Rosevale Realty Company, Inc., submitted in opposition to this motion, need not be printed in the record herein, it being stipulated and agreed that the said map is the same map which has been printed as an exhibit in the papers on appeal in the said case of Pauline R. Kalvin, relator v. Albert E. Kleinert, etc., and Rosevale Realty Company Inc., respondents which is an appeal from an order denying a motion for a mandamus and which appeal is pending in this court and will be heard together [fol. 78] with this appeal; and it is further

Stipulated and agreed, that the said map printed in said record on appeal in Kalvin against Kleinert, etc., and Rosevale Realty Company Inc., may be referred to and used on the argument of this appeal with the same force and effect as if printed in full in the record herein.

Dated March 28th, 1923.

Hirsh, Newman & Reass, Attorneys for Plaintiff, Appellant.
George P. Nicholson, Corporation Counsel of the City of New York, Attorney for Defendant.
J. George Silberstein, Attorney for Intervenors.

In Supreme Court of New York

Opinion by Faber, J.

The relator seeks a mandamus directing respondent building superintendent to issue a building permit. The building for which the relator seeks a permit if constructed will be in violation of the zoning resolution as amended and will be unlawful. No permit from the Superintendent of Buildings can make it lawful. For purposes of control and supervision the law requires that before a structure may be erected a permit must be obtained from the superintendent of buildings, but it is the law and not the permit which determines what structures may and may not be erected. So a structure erected in defiance of the law is an unlawful structure notwithstanding the superintendent may wrongfully have issued a permit for its erection. The zoning resolutions have the force and effect of a statute (Matter [fol. 79] of Stubbe vs. Adamson, 220 N. Y. 459). The building superintendent is presumed to know this law. He cannot be compelled to perform an unlawful act. If he did issue a permit before the passage of the amendment to the zoning resolution, such permit would ipso facto become invalidated by the passage of the amendment (See Southern Leasing Co. vs. Ludwig, 168 A. D., 233). On another application for a writ of mandamus made between these same parties affecting other property (N. Y. Law Journal, December 1, 1922), referred to by counsel in their briefs on this motion, the Appellate Division in sustaining the order of the Special Term denying the writ, held that the superintendent of buildings had no power or discretion to refuse a permit on the ground that the proposed building violated a restrictive covenant, but it will be noted that such decision in nowise applies to a case involving the zoning resolution, which as already stated, has the force and effect of a statute. Motion denied with $10 costs.

In Supreme Court of New York

Affidavit of Benjamin Reass

State, City, and County of New York, ss:

Benjamin Reass, being duly sworn deposes and says: I am a member of the firm *off* Hirsh, Newman and Reass, who are the attorneys for the plaintiff-appellant in the above entitled action.

I am familiar with all the proceedings herein. No written opinion was handed down by the Court on the making of the order appealed from other than the opinion by Mr. Justice Faber printed herein.

Benjamin Reass.

Sworn to before me this 29th day of March, 1923. Julien W. Newman, Commissioner of Deeds for the City of New York.

[fol. 80] IN SUPREME COURT OF NEW YORK

STIPULATION WAIVING CERTIFICATION

Pursuant to section 170 of the Civil Practice Act, it is hereby stipulated and agreed, that the papers as hereinbefore printed, consist of true and correct copies of the notice of appeal, order appealed from the affidavits and order to show cause, the summons and complaint and the exhibits and affidavits in opposition and exhibits being all the papers upon which the court below acted in making the order appealed from and the whole thereof now on file in the Office of the Clerk of the County of Kings; certification thereof, pursuant to Section 616 of the Civil Practice Act, is waived.

Dated March 30th, 1923.

Hirsh, Newman & Reass Attorneys for Plaintiff, Appellant. George P. Nicholson, Corporation Counsel, Attorney for Defendant, Respondent. J. George Silberstein, Attorney for Intervenors.

[fol. 81] IN SUPREME COURT OF NEW YORK

EXHIBIT IN EVIDENCE

Exhibit Annexed to Complaint in Case of Kalvin vs. Rosevale Realty Co., Inc., and Kleinert, Read in Opposition to Motion

(Here follows reproduction of exhibit, marked side folio page 81½)

[fol. 82] IN SUPREME COURT OF NEW YORK

[Title omitted]

ORDER OF AFFIRMANCE

Upon the notice of motion dated the 13th day of August, 1923; upon the affidavit of Benjamin Reass, vertified the 9th day of August, 1923; the order of affirmance herein, entered the 11th day of May, 1923, and the case on appeal and all the proceedings had hereunder, in support thereof, and after hearing Hirsh, Newman & Reass, Hugo Hirsh, Esq., of counsel, in support of said motion, and George P. Nicholson, Esq., Corporation Counsel, and James Marshall, Esq., in opposition thereto, it is

Ordered that the order heretofore made and entered herein on the 11th day of May, 1923, be resettled so as to read as follows:

CHART

TOO

LARGE

FOR

FILMING

[fol. 83] [Title omitted]

The above named Rosevale Realty Company, Inc., the relator in this proceeding, having appealed to the Appellate Division of the Supreme Court, from an order of the Supreme Court, entered in the office of the Clerk of the County of Kings, the 22nd day of March, 1923, denying motion for a peremptory mandamus order herein, and the said appeal having been argued by Mr. I. Henry Kutz, of counsel for the appellant, and by Mr. Joseph Reilly of counsel for the respondent and by Mr. James Marshall for intervenors, and due deliberation having been had thereon.

It is ordered that the order so appealed from be and the same is hereby affirmed upon the law and not in the exercise of discretion.

Enter.

William J. Kelly, Presiding Justice."

Enter. William J. Kelly, Presiding Justice.

[fol. 84] In Supreme Court of New York, Kings County

[Title omitted]

Notice of Appeal

Sirs: Please take notice that the plaintiff above named, Rosevale Realty Co., Inc., hereby appeals to the Court of Appeals of the State of New York from the order of the Appellate Division of the Supreme Court, in and for the Second Judicial Department, entered in the office of the Clerk of the said Appellate Division on the 19th day of October, 1923, and filed in the office of the Clerk of the County of Kings on the 2nd day of November, 1923, which order re-settles an order of the said Appellate Division entered in the office of the Clerk of the said Appellate Division on the 11th day of May, 1923, and filed in the office of the Clerk of the County of Kings on the 21st day of May, 1923, affirming an order of the Supreme Court, [fol. 85] Kings County entered in the office of the Clerk of Kings County on March 22, 1923, denying the motion of the plaintiff for the issuance of an order for a peremptory mandamus directing the above named Albert E. Kleinert, as Superintendent of the Bureau of Buildings of the Borough of Brooklyn, to do certain things set forth in the order to show cause obtained by the said plaintiff, and this appeal is taken from each and every part of said order of the said Appellate Division, as well as from the whole thereof.

Dated November 2, 1923.

Yours, etc., Hirsh, Newman & Reass, Attorneys for Plaintiff, Appellant, 100 Broadway, New York City.

To George P. Nicholson, Esq., Corporation Counsel, Attorney for Defendant, Respondent; Albert S. Kleinert, as Supt., etc., Municipal Building, New York City; J. George Silberstein, Esq., Attorney for Intervenors, Respondents, Midwood Manor Association and Pauline Kalvin, 120 Broadway, New York City; William E. Kelly, Esq., Clerk of the County of Kings.

[fol. 86] IN SUPREME COURT OF NEW YORK

AFFIDAVIT OF NO OPINION

STATE OF NEW YORK, ss:

Murry C. Becker, beingfi duly sworn deposes and says: I am managing attorney in the office of Hirsh, Newman & Reass, who are the attorneys for the plaintiff, appellant in this matter.

That in deciding the appeal herein, the Appellate Division of the Supreme Court in and for the Second Judicial Department did not write any opinion.

Murry C. Becker.

Sworn to before me this 21st day of May, 1923. I. Henry Kutz, Notary Public, New York County.

[fol. 87] IN SUPREME COURT OF NEW YORK

STIPULATION WAIVING CERTIFICATION

It is hereby stipulated and agreed that the foregoing are true copies of all papers upon which the Appellate Division acted in deciding the foregoing appeal and of each of them, the order of affirmance, notice of appeal to the Court of Appeals now on file in the office of the Clerk of the County of Kings, and certification of the same is hereby waived pursuant to the provisions of Section 170 of the Civil Practice Act.

It is further stipulated that the foregoing be filed in the Clerk's Office of the Court of Appeals as the return herein.

Dated December 11th, 1923.

Hirsh, Newman & Reass, Attorneys for Plaintiff, Appellant. George P. Nicholson, Esq., Corporation Counsel, Attorney for Defendant, Respondent. Albert E. Kleinert, as Superintendent of Buildings of the Borough of Brooklyn, City of New York. J. George Silberstein, Attorney for Intervenors, Respondents, Midwood Manor Association and Pauline R. Kalvin.

[fol. 88] IN SUPREME COURT OF NEW YORK

[Title omitted]

JUDGMENT—March 18, 1924

The plaintiff-appellant in the above entitled action having appealed to the Court of Appeals of the State of New York from an order of the Appellate Division of the Supreme Court in and for the Second Judicial Department, entered in the office of the Clerk of the Appellate Division on the 19th day of October, 1923, and filed in the office of the Clerk of the County of Kings on the 2nd day of November, 1923, which order resettles the order of the said Appellate Division, entered in the office of the Clerk of the said Appellate Division on the 11th day of May, 1923, and filed in the office of the Clerk of the County of Kings on the 21st day of May, 1923, and the said appeal having been duly argued at the Court of Appeals and after due deliberation the Court of Appeals having affirmed with costs the order appealed from and having further ordered and adjudged that the record therein and the proceedings in said Court be remitted to the Supreme Court there to be proceeded upon accord-
[fol. 89] ing to law.

Now upon reading and filing the said remi dated the 20th day of February, 1924 and on motion of P. Nicholson, Corporation Counsel, attorney for the respondent, Albert E. Kleinert, it is

Order and adjudged that the said order and judgment of the Court of Appeals be and the same hereby made the order and judgment of this court.

Enter.

J. Aspinall, J. S. C.

Granted Mar. 18, 1924. William E. Kelly, Clerk.

[fol. 90] IN COURT OF APPEALS

[Title omitted]

AFFIDAVIT OF HUGO HIRSH

STATE, CITY, AND COUNTY OF NEW YORK, ss:

Hugo Hirsch, being duly sworn, deposes and says: I am the attorney for the Rosevale Realty Co. Inc., plaintiff-in-error herein. In affirming the order of the Appellate Division, the Court of Appeals affirmed without opinion, Judges Cardozo and Lehman dissenting, however, on the ground that appellant is within the protection of Sections 23 and 24 of the Building Zone Resolution, and expressed no opinion upon the other questions suggested in the appellant's argument, and Judge Pound did not vote.

Hugo Hirsch,

Sworn to before me this 27th day of March, 1924. I. Henry Kutz, Notary Public, New York County. Co. Clk's. No. 434. Registers No. 4018. Commission expires March 30th, 1924.

[fol. 91] IN COURT OF APPEALS

WRIT OF ERROR

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable the Justices of the Supreme Court of the State of New York in and for the County of Kings, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said proceedings before you, or some of you, being the highest Court of law or equity of the said State in which a decision could be had in the said suit between The People of the State of New York ex rel. Rosevale Realty Co. Inc., Plaintiff-in-error, against Albert E. Kleinert, as Superintendent of the Bureau of Buildings of the Borough of Brooklyn, City of New York, Defendant-in-Error, and Midwood Manor Association and Pauline R. Kalvin, Intervenors-Defendants-in-Error, wherein was drawn in question the validity of a statute of or an authority exercised under said State on the ground of their being repugnant to the Constitution, treaties or laws of the United States and the decision was in favor of such their validity, or wherein any title, right, privilege, or immunity was claimed under the Constitution or any treaty or statute of or Commission held or authority exercised under the United States, and the decision was against the title, right, privilege, or immunity especially set up or claimed under such constitution, treaty, statute, commission or authority, a manifest error hath happened to the great damage of the said Rosevale Realty Co. Inc., Plaintiff-in Error herein, as by its petition appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this [fol. 92] behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date thereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness, the Hon. William Howard Taft, Chief Justice of the United States, the 25th day of March, in the year of our Lord One thousand Nine hundred and Twenty-four.

Percy H. Gilke, Clerk of the District Court of the United States for the Eastern District of New York. (Seal of District Court of the United States, Eastern District of New York.)

Writ allowed. Frank H. Hiscock, Chief Judge.

[fol. 93] IN COURT OF APPEALS

[Title omitted]

ORDER ALLOWING WRIT OF ERROR

On reading the petition of Rosevale Realty Co., Inc., by Hugo Hirsh, its attorney, for writ of error and the assignment of errors, and upon due consideration of the record of said cause, it is

Ordered, that a writ of error be allowed from the Supreme Court of the United States to the Supreme Court of the State of New York, as prayed for in said petition, and that said writ of error and citation thereon be issued, served and returned to the Supreme Court of the United States in accordance with law, upon condition that the said petitioner and the plaintiff-in-error, Rosevale Realty Co. Inc., give security in the sum of One Thousand Dollars that the said plaintiff-in-error shall prosecute said writ of error to effect and if said plaintiff-in-error fail to make its plea good, shall answer to the defendant-in-error for all costs and damages that may be adjudged or decreed on account of said writ of error, and the said plaintiff-in-error now presents a bond in the sum of One thousand Dollars, [fol. 94] with American Surety Company of New York as surety. It is

Ordered, that the same be and hereby is duly approved.

In witness whereof I have hereunto set my hand this 22 day of March, 1924.

Frank H. Hiscock, Chief Judge of the Court of Appeals of the State of New York.

[fol. 95] IN COURT OF APPEALS

[Title omitted]

ASSIGNMENT OF ERRORS

And now comes Rosevale Realty Company, Inc., petitioner and plaintiff-in-error, by Hugo Hirsh, its attorney, and in connection

with its petition for a writ of error shows that in the record and proceedings and in the rendering of the judgment and decision of the Court of Appeals of the State of New York in the above entitled cause manifest error has intervened to the prejudice of this petitioner and plaintiff-in-error in this, to wit:

First. The court erred in holding that so many of the provisions of the Resolution regulating and limiting the height and bulk of buildings hereafter erected and regulating and determining the area of yards, courts and other open spaces, and regulating and restricting the location of trades and industries and the location of buildings designated for specified uses and establishing the boundaries of districts for the said purposes, adopted on July 25, 1916 by the Board of Estimate and Apportionment of the City of New York, known as the "Building Zone Resolution," and as amended on Octo-[fol. 96] ber 20, 1922, by the said Board of Estimate and Apportionment as provide for and prescribe the limitations of the E area district were constitutional and did not violate the 14th amendment to the Constitution of the United States, and did not deprive the plaintiff-in-error of equal protection of the laws.

Second. The court erred in holding that so many of the provisions of the Resolution regulating and limiting the height and bulk of buildings hereafter erected and regulating and determining the area of yards, courts and other open spaces, and regulating and restricting the location of trades and industries and the location of buildings designated for specified uses and establishing the boundaries of districts for the said purposes, adopted on July 25, 1916 by the Board of Estimate and Apportionment of the City of New York, know as the "Building Zone Resolution" and as amended on October 20, 1922 by the said Board of Estimate and Apportionment as provide and require the plans prepared and filed and the proposed construction by the plaintiff-in-error upon the property of the Rosevale Realty Co., Inc., the plaintiff-in-error herein, located on the northeast corner of Avenue J. and E. 10th Street, in the Borough of Brooklyn, City and State of New York, to comply with the other provisions of the said Resolution prescribing the limitations of the so-called E. area district, were constitutional and did not violate the 14th amendment of the Constitution of the United States and did not deprive the plaintiff in error of equal protection of the laws.

By reason whereof, this petitioner, plaintiff-in-error, prays that the said judgment entered in the Supreme Court of the State of New York, in and for the County of Kings, on the order and determination of the Court of Appeals be reversed and set aside and held for naught, and that the judgment be rendered for the plaintiff-in-[fol. 97] error granting to it its rights under the laws and Constitution of the United States, and, particularly, judgment for the relief demanded in its petition in the within action and proceeding.

Hugo Hirsh, Attorney for Rosevale Realty Co., Inc., Plaintiff-in-Error, 100 Broadway, New York, N. Y.

[fol. 98] IN COURT OF APPEALS

[Title omitted]

PETITION FOR WRIT OF ERROR

To the Honorable Frank H. Hiscock, Chief Judge of the Court of Appeals of the State of New York:

And now comes Rosevale Realty Co., Inc. relator and plaintiff-in-error in the above entitled proceeding and represents that on the 20th day of February, 1924, an order was duly made herein by the Court of Appeals of the State of New York affirming the order of the Appellate Division of the Supreme Court, in and for the Second Judicial Department, entered on the 19th day of October, 1923, and filed in the Office of the Clerk of the County of Kings on the 2nd day of November, 1923, which said order of the said Appellate Division resettled the order herein of the said Appellate Division entered in the office of the Clerk of the said Appellate Division on the 11th day of May, 1923, and filed in the Office of the Clerk of the County of Kings on the 21st day of May, 1923, and the said order of affirmance herein of the Court of Appeals dated the 20th day of February, 1924, was duly remitted into the Supreme Court [fol. 99] of the State of New York, and in accordance with the form of the statute in such case made and provided a final order and judgment was duly made and entered in the said Supreme Court and filed in the Office of the Clerk of the County of Kings on the 15th day of March, 1924, making the said order of affirmance herein of the Court of Appeals the order and judgment of the said Supreme Court, in accordance with the terms and as directed by the said order of affirmance of the Court of Appeals, and judgment was entered in the above entitled action awarding costs in favor of Albert E. Kleinert, as Superintendent of the Bureau of Buildings of the Borough of Brooklyn, City of New York, defendant-in-error herein and in favor of Midwood Manor Association and Pauline R. Kalvin, intervenors-defendants-in-error herein, in the amount of One hundred Seventy-six and 16/100 ($176.16) Dollars.

This is an action for an order of mandamus wherein Rosevale Realty Co. Inc. was relator and Albert E. Kleinert, as Superintendent of the Bureau of Buildings of the Borough of Brooklyn, City of New York, was respondent, and Midwood Manor Association and Pauline R. Kalvin were intervenors-respondents.

And your petitioner avers that in the petition filed by it in this proceeding it showed that it was a corporation duly organized and existing under and by virtue of the laws of the State of New York with its principal place of business in the Borough of Brooklyn, County of Kings, City and State of New York; that it was the owner in fee simple of premises situated on the northeast corner of Avenue J. and East 10th Street, in the Borough of Brooklyn, City of New York, and that your petitioner caused certain plans and specifica-

tions for the erection upon the said premises of an apartment house [fol. 100] to be duly drawn and prepared and the said plans and specifications were duly prepared in accordance with the laws applicable thereto and, in particular, in accordance with the Resolution regulating and limiting the height and bulk of buildings hereafter erected and regulating and determining the area of yards, courts and other open spaces, and regulating and restricting the location of trades and industries and the location of buildings designated for specified uses and establishing the boundaries of districts for the said purposes, adopted by the Board of Estimate and Apportionment of the City of New York on the 25th day of July, 1916, and known as "Building Zone Resolution."

The said petition further showed that the said plans were duly filed in the office of the Tenement House Department of the Borough of Brooklyn, City of New York, on the 18th day of July, 1922, and thereafter and on or about August 31, 1922, the same were duly approved by the said Tenement House Department and were thereupon forwarded to the Bureau of Buildings in the said Borough and duly filed in the office of Albert E. Kleinert, as Superintendent of the Bureau of Buildings of the Borough of Brooklyn, City of New York, the defendant-in-error herein, for the purpose of having the aforesaid plans duly approved by the said Superintendent of the Bureau of Buildings, Albert E. Kleinert, and for the purpose of obtaining a a permit to be issued by the said Albert E. Kleinert, the defendant-in-error herein.

The petition further shows that thereafter and on or about September 1, 1922, the said Albert E. Kleinert, the defendant-in-error herein, duly issued a temporary permit for the installation of the necessary footings and foundation for the proposed building to be erected by your petitioner, but that on September 2, 1922, the said defendant-in-error, Albert E. Kleinert, revoked the aforesaid temporary permit and at the same time notified your petitioner that the [fol. 101] said temporary permit was revoked because of an application pending before the Board of Estimate and Apportionment of the City of New York to amend the resolution adopted by said Board on July 25, 1916 and referred to hereinabove and known as the "Building Zone Resolution" to place the premises hereinabove mentioned belonging to your petitioner and upon which your petitioner desires to erect the proposed apartment house, within the restrictions prescribed for the E area zone or district provided for by the said Building Zone Resolution. The said petition filed by your petitioner further shows that the defendant-in-error, Albert E. Kleinert, as Superintendent of the Bureau of Buildings aforesaid, refused to approve the plan submitted by your petitioner and refused to issue a permit to your petitioner until the application to amend the said zoning resolution was passed upon by the said Board of Estimate and Apportionment, and at the meeting of the said Board of Estimate and Apportionment held on the 20th day of October, 1922, the said Board of Estimate and Apportionment duly passed a resolution amending the aforesaid Building Zone Resolution by changing the area district map, Section No. 22 so as to change from a C to an E

area district East 10th Street, from the Manhattan Beach Division of the Long Island Railroad to the northerly line of Avenue K, in the Borough of Brooklyn, City and State of New York, and the area described and mentioned in the aforesaid amendment to the building zone law included the premises on the northeast corner of Avenue J and East 10th Street, in the Borough of Brooklyn, City and State of New York, as aforesaid, belonging to your petitioner herein.

The said petition duly filed below further showed that your petitioner has complied with all the rules, regulations, requirements and laws in effect or in existence on July 18, 1922, at the time when the [fol. 102] plans for its proposed buildings were filed in the office of the Tenement House Department, in the Borough of Brooklyn, City of New York, and has duly complied with all the rules, regulations, requirements and laws in effect or in existence on the 31st day of August, 1922, when the said plans, having been approved by the said Tenement House Department were filed in the office of the defendant-in-error herein, and that in particular all provisions and requirements of the so-called building zone resolution at both the above mentioned dates had been duly complied with.

The petition further showed that your petitioner has suffered irreparable damage and will suffer irreparable damage because of the failure of the defendant-in-error herein, Albert E. Kleinert, as Superintendent of the Bureau of Buildings for the said Borough in the City and State of New York, to approve the said plans and issue a permit to your petitioner.

And in the said petition your petitioner herein prayed for relief in that a peremptory mandamus be made, directing the said Albert E. Kleinert, as Superintendent of the Bureau of Buildings of the Borough of Brooklyn, City and State of New York, the defendant-in-error herein, to take up, examine and approve the aforesaid plans of your petitioner herein, and to issue a permit to your petitioner in accordance with law.

The defense raised in the answering papers filed by the defendant-in-error herein showed that your petitioner had not complied with the amendment to the Building Zone Resolution adopted by the Board of Estimate and Apportionment of the City of New York on the 20th day of October, 1922, changing from a C area district to an E area district the property, which your petitioner owns and upon which it desires to erect the proposed structure above mentioned.

And your petitioner avers that in its said petition filed herein he [fol. 103] expressly charged that the aforesaid amendment adopted on October 20, 1922, to the Building Zone Resolution and so many of the provisions of the said Building Zone Resolution adopted on July 25, 1916, and as amended on October 20, 1922, as provided for and prescribed the limitations of the E area district, were unconstitutional and deprived your petitioner of property without due process of law and contravened the 14th Amendment to the Constitution of the United States.

And further your petitioner avers that in his said petition he expressly charged that if the aforesaid resolution of the Board of

Estimate and Apportionment adopted on July 25, 1916, was construed so that the aforesaid amendment adopted on October 20, 1922, to the said resolution applied to the premises owned by your petitioner and to the proposed construction thereon beforementioned, then the said resolution was unconstitutional and deprived your petitioner of property without due process of law and contravened the 14th Amendment to the Constitution of the United States.

And your petitioner further avers that, nevertheless, the said judgment and decision was in favor of the validity of the said resolution and the said amendment thereto.

And your petitioner further avers that in the aforesaid judgment and proceedings certain errors were committed to the prejudice of your petitioner, all of which will more fully appear from the assignment of errors, which is filed herewith.

Wherefore, your petitioner prays that a writ of error from the Supreme Court of the United States may issue in this case to the Supreme Court of the State of New York for the correction of errors so complained of, and that a transcript of record, proceedings and papers in this case, duly authenticated by the County Clerk of the County of Kings, who is the Clerk of the Supreme Court of the State of New York, in and for said County, in whose office and charge [fol. 104] the record, proceedings and papers in this case are duly filed, may be sent to the Supreme Court of the United States as provided by law.

Dated, March 21, 1924.

Hugo Hirsh, Attorney for Rosevale Realty Co., Inc., Petitioner and Plaintiff in Error, 100 Broadway, New York City.

[fols. 105-107] Bond on Writ of Error for $1,000—Approved and filed March 22, 1924; omitted in printing

---

[fols. 108 & 109] Citation—In usual forms showing service on Geo. P. Nicholson; omitted in printing

---

[fol. 110] In Supreme Court

[Title omitted]

Clerk's Certificate

I, William E. Kelly, Clerk of the County of Kings and of the Supreme Court of the State of New York in and for said County of Kings, by virtue of the annexed writ of error which was served on me on March 28, 1924, and in obedience thereof, do hereby certify

that the foregoing pages numbered from 1 to 89 inclusive, contain a true and complete transcript of the record and proceedings had in the said court in this suit between People of the State of New York, ex rel. Rosevale Realty Co., Inc., plaintiff-in-error, against Albert E. Kleinert, as Superintendent of the Bureau of Buildings of the Borough of Brooklyn, City of New York, defendant-in-error, and Midwood Manor Association and Pauline R. Kalvin, intervenors-defendants-in-error, mentioned in said writ of error, as the same remains of record and on file in my office. And that annexed hereto is the petition for the said writ of error, the assignment of errors and prayer for reversal, order allowing the said writ, bond on reversal [fol. 111] duly approved March 21, 1924 given as security for the prosecution of the said writ of error, citation to defendants-in-error, admission of service of the same and the said writ of error served upon me.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed and have hereunto set my hand at my office in the City of New York in the County of Kings on the 28th day of March, 1924.

William E. Kelly, County Clerk, Kings Co., N. Y. (Seal of Kings County.)

[fol. 112] IN COURT OF APPEALS

CLERK'S CERTIFICATE

I, Wm. J. Armstrong, Clerk of the Court of Appeals of the said State of New York, do hereby certify that I have compared the annexed copy of decision in the case of The People, &c., ex rel. Rosevale Realty Co., Inc., Appellant, vs. Albert E. Kleinert, as Superintendent, &c., Respondent, Midwood Manor Association and another, Intervenors-Respondents, handed down by this court February 19, 1924, with the original on file in this office, and that the same is a correct transcript therefrom and of the whole of said original.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court of Appeals, at the City of Albany, this 31st day of March A. D., 1924.

Wm. J. Armstrong, Clerk. (Seal of Court of Appeals State of New York.)

[fol. 113] IN COURT OF APPEALS

[Title omitted]

ORDER OF AFFIRMANCE

Order affirmed with costs.

No opinion.

Concur: Hiscock, Chief Judge, McLaughlin, Crane, Andrews, JJ.

Cardozo and Lehman, JJ., dissent on ground that appellant is within the protection of Sections 23 and 24 of Building Zone resolution and express no opinion upon the other questions suggested in the appellant's argument.

Not voting: Pound, J.

Endorsed on cover: File No. 30,241. New York Supreme Court. Term No. 350. The People of the State of New York ex rel. Rosevale Realty Co., Inc., plaintiff in error, vs. Albert E. Kleinert, as superintendent of the bureau of buildings of the borough of Brooklyn, city of New York and Midwood Manor Association and Pauline R. Kalvin. Filed April 2, 1924. File No. 30,241.

FILED
APR 15 1925
WM. R. STANSBURY
CLERK

Supreme Court of the United States,

OCTOBER TERM, 1924.

No. 350.

THE PEOPLE OF THE STATE OF NEW YORK, *ex rel.*,
ROSEVALE REALTY CO., INC.,
Plaintiff in Error,

against

ALBERT E. KLEINERT, AS SUPERINTENDENT OF THE BUREAU OF BUILDINGS OF THE BOROUGH OF BROOKLYN, CITY OF NEW YORK, AND MIDWOOD MANOR ASSOCIATION AND PAULINE R. KALVIN.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

BRIEF FOR PLAINTIFF IN ERROR.

BENJAMIN REASS,
EMANUEL NEWMAN,
HUGO HIRSH,
Of Counsel.

The Standard Press Job Printing Office, Inc., 154 Nassau St., New York, N. Y.

SUBJECT INDEX.

PAGE

Statement 2

Assignments of Error..... 7

ARGUMENT:

POINT I. The Supreme Court has jurisdiction to review the judgment appealed from by writ of error..... 9

POINT II. Mandamus is the proper remedy to compel the defendant in error, the Superintendent of the Bureau of Buildings of the Borough of Brooklyn of The City of New York, to approve the plans filed and grant a building permit since the plans comply with all the provisions of the law..... 12

POINT III. The Zoning Ordinance of the City of New York, in so far as the E area district provisions of the same are applicable to the property of plaintiff-in-error, is an invalid exercise of the police power and violates the Fourteenth Amendment to the Constitution of the United States by depriving plaintiff-in-error of its property without due process of law and denying the equal protection of the laws 15

A. It is clear from a reading of the statute and ordinance that it is intended to be an exercise of the police power 28

PAGE

B. The purpose of the restrictions of the E area district is to create or preserve by means of segregation highly restricted residential developments dedicated to detached or semi-detached dwellings and to prohibit apartment houses..... 29

C. The restrictions forming the E area district are not and cannot be justified as being passed for the purpose of discouraging the building of apartment houses in general and for the purpose of bringing about better housing conditions for those now dwelling in apartment houses. 35

D. The nature of the restriction involved is not regulatory but confiscatory. 36

E. The restrictions involved are not and cannot be justified by reason of an existing emergency 37

F. The prohibition without compensation of a use to which private property may be put is a taking, and is justifiable only under a valid exercise of the police power..... 37

G. Private property may not be confiscated to create or preserve by means of segregation highly restricted residential developments dedicated to use for detached and semi-detached dwellings and prohibiting apartment houses..... 40

PAGE

H. The interpretation given by the State Courts to Sections 23 and 24 of the Zoning Resolution results in an illegal confiscation of the plans prepared to conform to the C Area District Restrictions by plaintiff-in-error before the amendment, approved by the Tenement House Department and filed in the office of the defendant-in-error before the change in zone..... 68

I. It is an unconstitutional use of the police power to create districts segregating persons of different economic levels 69

POINT IV. The Board of Appeals could not have afforded plaintiff-in-error an adequate remedy and it was not necessary for plaintiff-in-error to appeal to it before applying to the Courts for relief.. 73

POINT V. For these reasons it is respectfully submitted the judgment and order below should be reversed..... 77

CASES CITED.

A.

PAGE

Adams *v.* Tanner (244 U. S. 590) 37, 67
Adkins *v.* Childrens Hospital (261 U. S. 525) 67
Ambler Realty Co. *v.* Village of Euclid (297 Fed. 307) 43, 56, 72

B.

Better Built Home & Mortgage Co. *v.* Davis (301 Mo. 307) 71
Buchanan *v.* Warley (245 U. S. 60)..... 67, 71

C.

City of St. Louis *v.* Evraiff (301 Mo. 231)... 60

E.

Eubank *v.* Richmond (226 U. S. 137)..... 71

F.

Fitzhugh *v.* Jackson (132 Mississippi 585).. 60
Forster *v.* Scott (136 N. Y. 577)..... 38
Fruth *v.* Board of Affairs (75 W. Va. 456).. 53

G.

Goldman *v.* Crowther (128 Atlantic Rep. 50) 61, 68, 70

H.

Heller Sign Works *v.* Physical Culture Training School (249 Ill. 346)..... 52
Hurwitz *v.* Moore (132 N. Y. App. Div. 29). 13

I.

Ignaciunas *v.* Nutley (125 Atlantic Rep. 121) 62

L.

Lachtman v. Houghton (134 Minn. 226)..45, 61, 72
Lake Island Realty Co. *v.* McDermott (96 N. Y. Misc. 37) 14
Lincoln Trust Co. *v.* Williams Bldg. Corp. (229 N. Y. 313) 63

M.

PAGE

Marshall *v.* Dallas (253 S. W. 887)..... 51
Meyer *v.* Nebraska (262 U. S. 390)..... 67
Municipal Gas Co. *v.* Nolan (121 N. Y. Misc. 606; affirmed on opinion below 208 N. Y. App. Div. 753)..... 76

O.

Ohlau *v.* Kleinert (121 N. Y. Misc. 386; affirmed on opinion below 209 N. Y. App. Div. 824) 13
Opinion of the Justices (234 Mass. 597).... 64

P.

Palmer *v.* Mann (206 N. Y. App. Div. 484).. 13
Passaic *v.* Patterson Bill Posting Co. (72 N. J. Law 285) 43, 53
Pennsylvania Coal Co. *v.* Mahon (260 U. S. 393) 48, 67
Penrose Insurance Co. *v.* McKelvey (301 Mo. 1) 39, 51, 59

S.

Sheldon *v.* Board of Appeals (234 N. Y. 484) 74
Spann *v.* Dallas (111 Texas 350).....42, 66
Swain *v.* Reville (50 N. Y. Misc. 474)..... 14

T.

Twin Cities Building & Investment Co. *v.* Houghton (144 Minn. 13) 44, 71

W.

Weinburgh v. Murphy (195 N. Y. 126)..... 42, 54
Westminster Presbyterian Church *v.* Edgecomb (108 Neb. 859)..... 54
Wilkson *v.* Cooke (54 Col. 320)..... 39, 54
Wolff Packing Co. *v.* Industrial Court (262 U. S. 522) 67

STATUTES, TEXT BOOKS, ETC.

PAGE

Bassett, Edward M., "Zoning" 30
(National Municipal League, Technical Pamphlet Series, Number 5, revised 1922, page 322.)

Code of Ordinances of the City of New York. (Adopted on June 20, 1916, and approved July 6, 1916. Chapter 5, Article 1, Sec. 4, Sub. 1) 12

Act of Congress, March 3, 1911, Chap. 231, 36 Stat. 1156 9

N. Y. Laws, 1916, Chap. 497, Secs. 242*a*, 242*b* 16, 20, 28, 50, 55

N. Y. Laws, 1920, Chap. 925, Sec. 589, Sub. 1. 11
Sub. 2. 10

(Civil Practice Act)

Zoning Resolution of the City of New York. (Adopted by Board of Estimate and Apportionment July 15, 1916, and amendments.)

Supreme Court of the United States

OCTOBER TERM, 1924

No. 350

The People of the State of New York *ex rel.* ROSEVALE REALTY CO. INC.,
Plaintiff in Error,

AGAINST

ALBERT E. KLEINERT, as Superintendent of the Bureau of Buildings of the Borough of Brooklyn, City of New York,
Defendant in Error,

MIDWOOD MANOR ASSOCIATION and PAULINE KALVIN,
Intervenors-Defendants in Error

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

BRIEF FOR PLAINTIFF IN ERROR

The writ of error herein brings to this Court the order and judgment of the Supreme Court of the State of New York, in and for the County of Kings, entered on the 18th day of March, 1924 (R. 45), upon the order and remittitur of the Court of

Appeals of the State of New York, dated February 20, 1924 (R. 1), affirming the resettled order of the Appellate Division of the Supreme Court in and for the Second Department entered in the Office of the Clerk of the aforesaid Appellate Division on the 19th day of October, 1923, and remitting the same to the Supreme Court of the State of New York to be proceeded upon according to law. The aforesaid order of the Appellate Division in turn affirmed expressly *upon the law and not in the exercise of discretion,* (R. 42, 43) the order of the Supreme Court of the State of New York in and for the County of Kings, dated March 21, 1923, denying the motion of the People of the State of New York *ex rel.* Rosevale Realty Co. Inc., plaintiff-in-error herein, for a peremptory mandamus order directing the defendant in error, Albert E. Kleinert, Superintendent of the Bureau of Buildings of the Borough of Brooklyn, City of New York, forthwith to take up and pass upon and approve the plans filed by the aforesaid Rosevale Realty Co. Inc. in his office on September 1, 1922 and requiring him to grant to the Rosevale Realty Co. Inc. a permit to erect the building described in the aforesaid application for a permit and in the plans (R. 2-4).

Statement.

The facts are simple and not in dispute. The plaintiff in error is and has been since March, 1922 the owner of a lot of land one hundred feet square, (100 feet x 100 feet) situated on the northeast corner of Avenue J. and East 10th Street, in the Borough of Brooklyn, City of New York (R. 5; see Map attached to R. 43). The plaintiff in error em-

ployed Mr. Hugo Magnuson, a competent architect, whose affidavit is annexed to the moving papers (R. 14-15) to prepare plans for the construction of a brick apartment house arranged for forty families and at considerable expense these plans were prepared. They were duly filed in accordance with law with the Tenement House Department of The City of New York on July 18, 1922 (R. 5). The Tenement House Department approved them on August 31, 1922, (R. 5) and, on the next day they were filed in the office of Albert E. Kleinert, as Superintendent of the Bureau of Buildings of the Borough of Brooklyn of the City of New York, defendant in error herein, under file No. 15021—1922 (R. 5-6) for the purpose of obtaining from him the building permit required by law. The defendant in error caused the issuance of a temporary permit for the installation of the necessary footings and foundations (R. 6) on September 1, 1922, but on the next day revoked the same (R. 6) by a letter, forming part of the record herein and attached to the moving papers, marked Exhibit A, (R. 11) expressly "by reason of a petition by owners of 50% or more of frontage on East 10th Street between what is known as L. I. R. R. cut and Avenue K, which was forwarded to the Board of Estimate and Apportionment to place the prescribed locality wholly in the "E area or zone", which district or zone prohibits the class of construction intended by Application 15021".

The petition to the Board of Estimate and Apportionment of The City of New York referred to in this letter is also part of the record herein (R. 39-40). Under the ordinance of The City of New York adopted by the Board of Estimate and Apportionment on July 25, 1916 and commonly known

as the "Zoning Resolution" the premises involved were placed in a C area district. The purpose of the petition of the neighboring property owners mentioned in the letter of the defendant in error, by which he revoked the temporary permit, was to restrict these premises still further and to persuade the Board of Estimate and Apportionment to amend the "Zoning Resolution" by placing the premises involved in a so-called E area district instead of the C area district. This petition is discussed in detail below.

Again, on September 8, 1922, in answer to a communication made by the architect of the plaintiff in error, the Superintendent of the Bureau of Buildings wrote the letter, which is part of the record herein and marked Exhibit C, (R. 13) in which he said that if the plans were "found to comply with the code they will be so marked but the permit will be withheld pending action of the Board of Estimate and Apportionment on a petition which has been presented to that body to change the character of the zoning district". Certain minor changes in the plans were thereafter ordered by the defendant in error. These were duly made and approved by him as evidenced by Exhibit D. read in support of the motion (R. 14).

Thereafter, and on October 20, 1922 the Board of Estimate and Apportionment of the City of New York amended the so-called "Zoning Resolution," adopted by them on July 25, 1916, "by changing the Area District Map, section No. 22, so as to change from a 'C' to an 'E' Area District, where not heretofore established, East 10th Street from the Manhattan Beach Division of the Long Island Railroad to the northerly line of Avenue K, Borough of Brooklyn" (R. 13). This included the premises of

relator on the northeast corner of Avenue J and East 10th Street, as the map contained in the record shows. (R. 42)

In his affidavit submitted in opposition to the motion herein, defendant-in-error deposes as follows:

"Deponent alleges that plaintiff has not complied with the rules, regulations and requirements of the Building Code and of the Building Zone Resolution, adopted July 25, 1916, and the amendments thereto, in that the plans it filed with the Bureau of Buildings are for a forty family apartment house which it proposes to construct upon land lying in an 'E' Area District and a Residence District, as designated on the 'Use' Map and said buildings as shown on the plans would be in violation of the rules and regulations which apply to such districts." (R. 17)

The additional objection made in this affidavit that plaintiff-in-error had failed to file proof of having obtained "compensation insurance", as required by statute, (R. 18) is an obvious afterthought. It was not raised in the letters of September 2, 1922 (R. 11) and of September 8, 1922 (R. 13), nor in the formal denial of the application for a permit (R. 17). In each of these cases the sole objection is failure to comply with provisions of the Zoning Resolution. *It was not argued by counsel or considered by the courts below.*

Besides, as the replying affidavits submitted by plaintiff-in-error show it is not as a matter of fact true that plaintiff-in-error failed to file proof of having obtained compensation insurance as required by law. The replying affidavit of Hugo Magnuson, an architect of many years' experience, and who was, as aforesaid, employed by appellant

to prepare and file the plans herein, shows that proof of compensation insurance was filed, and the card, marked Exhibit 1, from the office of the defendant-in-error, acknowledging receipt of such proof, was obtained (R. 14-16; 16). It has not been disputed below and it will not now be disputed that the sole and only reason for the refusal to issue the permit is the failure of the plaintiff-in-error to comply with the amended Zoning Resolution. That this must be true is apparent from a reading of the correspondence between the parties.

Meanwhile, an action had been commenced against the plaintiff-in-error in the Supreme Court of the State of New York by Pauline R. Kalvin, one of the intervenors-defendants-in-error, a neighboring property owner, seeking an injunction restraining the plaintiff-in-error from constructing the building intended to be erected according to its plans, as filed with the Superintendent of the Bureau of Buildings, on the ground that this building violated certain restrictive covenants between the parties, namely, a covenant requiring a 20-foot setback on Avenue J and East 10th Street, and a covenant requiring the approval of the plans by a certain Greater New York Development Company (R. 24). These covenants by their terms expired on January 1, 1923, (R. 29) and the injunction order resulting from this action, granted on October 20, 1922, *merely restrained the construction until January 1, 1923, the date of the expiration of the restrictive covenants* (R. 39). The proposed construction in any event could not have been completed until after January 1, 1923. Plaintiff-in-error had proceeded on the theory that the commencement of construction in the autumn months before that date would cause no damage. The pres-

ent application was not made until after the termination of the injunction and mention is made of it only to explain the papers in the action, of which it was the result, included by the intervenors in the record.

After the refusal of the defendant-in-error to issue a building permit by reason, as aforesaid, of the petition pending before the Board of Estimate and Apportionment for a change in the area district, plaintiff-in-error on September 8, 1922, applied for an order of mandamus similar to the application made in this case. This was denied, however, and on December 1, 1922, the Appellate Division of the Supreme Court of the Second Department affirmed the order denying the application in view of the fact that "this court has issued an injunction prohibiting the petitioner from constructing the building in question", referring to the injunction granted in the action brought by Pauline R. Kalvin, intervenor-defendant-in-error, for violation of the restrictive covenants, but expressly stating that the denial was "without prejudice to an application to be made after the vacation or termination of the injunction" (R. 8). Accordingly, the application was renewed by the petition herein, dated January 25, 1923, after the termination of the restrictive covenants of the injunction order (R. 9).

Assignments of Error.

FIRST: The court erred in holding that so many of the provisions of the Resolution regulating and limiting the height and bulk of buildings hereafter erected and regulating and determining the area of yards, courts and other open spaces, and regulating and restricting the location of trades and industries and the location of buildings designated for speci-

fied uses and establishing the boundaries of districts for the said purposes, adopted on July 25, 1916, by the Board of Estimate and Apportionment of the City of New York, known as the "Building Zone Resolution", and as amended on October 20, 1922, by the said Board of Estimate and Apportionment as provide for and prescribe the limitations of the E area district were constitutional and did not violate the 14th amendment to the Constitution of the United States, and did not deprive the plaintiff in error of equal protection of the laws.

SECOND: The court erred in holding that so many of the provisions of the Resolution regulating and limiting the height and bulk of buildings hereafter erected and regulating and determining the area of yards, courts and other open spaces, and regulating and restricting the location of trades and industries and the location of buildings designated for specified uses and establishing the boundaries of districts for the said purposes, adopted on July 25, 1916 by the Board of Estimate and Apportionment of the City of New York, known as the "Building Zone Resolution" and as amended on October 20, 1922 by the said Board of Estimate and Apportionment as provide and require the plans prepared and filed and the proposed construction by the plaintiff in error upon the property of the Rosevale Realty Co. Inc., the plaintiff in error herein, located on the northeast corner of Avenue J. and East 10th Street, in the Borough of Brooklyn, City and State of New York, to comply with the other provisions of the said Resolution prescribing the limitations of the so-called E. area district, were constitutional and did not violate the 14th amendment of the Constitution of the United States and did not deprive the plaintiff in error of equal protection of the laws.

POINTS

I.

The Supreme Court has jurisdiction to review the judgment appealed from by writ of error.

The authorization for the writ of error herein is found in Section 237 of the Judicial Code, Act of Cong. March 3, 1911, ch. 231, 36 Stat. 1156. It brings to this court a final judgment or decree in the highest court of the State in which a decision could be had where is drawn in question the validity of a statute of the state on the ground of its being repugnant to the Constitution of the United States and the decision below has been in favor of the validity of the Statute. The statute in question is the Zoning Resolution or ordinance of the City of New York, entitled "A resolution regulating and limiting the height and bulk of buildings hereafter erected and regulating and determining the area of yards, courts and other open spaces, and regulating and restricting the location of trades and industries and the location of buildings designed for specified uses and establishing the boundaries of districts for the said purposes", adopted by the Board of Etimate and Apportionment of The City of New York on July 25, 1916 and as amended on October 20, 1922, in so far as it requires plaintiff in error to comply with the provisions thereof prescribing the requirements of the E area district.

It is the contention of the plaintiff in error that these sections of this ordinance are in conflict with the Constitution of the United States in that they

violate the 14th amendment to the Constitution by depriving the plaintiff in error of property without due process of law and by denying to plaintiff in error the equal protection of the laws. *The constitutionality of this ordinance was challenged in the petition by which the proceeding involved herein was commenced* (R. 7-8) *and it has been contested strenuously by the plaintiff in error in all of the State courts.*

On March 21, 1923 the order of the Supreme Court of the State of New York in and for the County of Kings was entered denying plaintiff in error's motion for a peremptory mandamus (R. 2-4). Appeal was taken from this order to the Appellate Division of the Supreme Court of the State of New York for the Second Department, which affirmed the order expressly, however, "*upon the law and not in the exercise of discretion*" (R. 43), by a resettled order entered on October 19, 1923, filed in the office of the Clerk of the County of Kings on November 2, 1923 (R. 42-43). The aforesaid Appellate Division of the Supreme Court is by the laws of the State of New York the highest court which has jurisdiction to review questions of fact, the Court of Appeals being limited by statute to the review of questions of law (Civil Practice Act, New York Laws 1920, Chapter 925, Section 589, subsection 2).

From the determination of the Appellate Division, an appeal was taken to the Court of Appeals, as a matter of right, because it was an appeal "from a judgment or order entered upon the decision of an Appellate Division of the Supreme Court which finally determines an action or special proceeding where is directly involved the construction of the Constitution * * * of the United States".

(Civil Practice Act, N. Y. Laws 1920, Chap. 925, Section 588, subsection 1). In addition to the constitutional question there was argued in the Court of Appeals, as well as below, the contention that by a true interpretation of Sections 23 and 24 of the Zoning Resolution, inasmuch as the plans for the proposed construction were on file with the Building Superintendent and with the Tenement House Department at the time of the passage of the amendment thereto, this amendment later passed did not apply to those plans. The majority of the Court of Appeals decided against plaintiff in error on both of these contentions, *but only four of the seven judges passed on the question of constitutionality,* Pound, *J.* not voting on any of the questions, and Cardozo and Lehman, *JJ.* dissenting on the ground "that appellant is within the protection of Sections 23 and 24 of the Building Zone Resolution and express no opinion upon the other questions suggested in the appellant's argument" (R. 54). No opinion was written by any of the courts except by Faber, *J.* at Special Term in the Supreme Court where is discussed merely the question of the interpretation of the Zoning Resolution as applicable to the plans of plaintiff-in-error (R. 41).

II.

Mandamus is the proper remedy to compel the defendant in error, the Superintendent of the Bureau of Buildings of the Borough of Brooklyn of The City of New York, to approve the plans filed and grant a building permit since the plans comply with all the provisions of the law.

The Superintendent of the Bureau of Buildings, as already shown, refused to approve the plans and grant a permit for building solely and expressly on the ground of the failure of the plaintiff in error to comply with the provisions of the Zoning Resolution providing for the E area district (R. 17). The approval of plans and the granting of a permit is a *ministerial* act and *where compliance with all the requirements of law has been shown, mandamus is the proper remedy to compel the defendant in error to perform this duty.* The provision of the so-called "Building Code" of The City of New York authorizing the Superintendent of the Bureau of Buildings to approve plans and grant permits reads, so far as relevant, as follows:

> "The Superintendent of Buildings *shall approve* or reject any application or plan or amendment thereto filed with him pursuant to the provisions of this Article within a reasonable time and, if approved, *shall promptly issue a permit therefor.*"
>
> Code of Ordinances of The City of New York adopted on June 20, 1916 and approved July 6, 1916, Chap. 5, Article 1, Section 4, subd. 1.

The language of the ordinance is mandatory; it uses the word "shall". There is no discretion granted.

The State courts have uniformly granted relief by way of mandamus where the Superintendent of the Bureau of Buildings or a like official has refused a building permit without just cause. In *Matter of Palmer* v. *Mann*, 206 N. Y. App. Div. 484, (affirmed without opinion 237 N. Y. 616) the Tenement House Commissioner of The City of New York had refused to approve certain plans for the erection of an apartment house on the ground that the plans were in conflict with an amendment to the Zoning Resolution. The Court held, however, that the amendment in question had not been duly adopted and granted the application of the relator for a peremptory mandamus order.

Matter of Ohlau v. *Kleinert*, 121 N. Y. Miscellaneous 386, affirmed 209 N. Y. App. Div. 824, on the opinion below, was a petition for a peremptory mandamus against the very defendant in error herein, as Superintendent of the Bureau of Buildings of the Borough of Brooklyn, City of New York, to compel him to rescind the attempted revocation of a temporary building permit for the erection of a garage. The Superintendent had revoked the permit on the ground that the Zoning Resolution had been amended so that the property in question was in a district in which garages could not be erected. The court granted a mandamus order against defendant-in-error herein.

In *Hurwitz* v. *Moore*, 132 N. Y. App. Div. 29, the Appellate Division of the Second Department granted a writ of peremptory mandamus against the Superintendent of the Bureau of Buildings requiring him to pass upon an application and grant

a permit allowing relator to make alterations on certain buildings in accordance with plans approved by the Tenement House Department. The Superintendent of Buildings had declined to pass upon the application, giving as a reason that the Borough President had instructed him not to do so. The court considered the reason for his refusal to act unjustified, overruled it, and granted a mandamus order.

In *Lakes Island Realty Co.* vs. *McDermott,* 96 N. Y. Miscellaneous 37, Mr. Justice Cropsey at Special Term refused to enjoin the Superintendent of the Bureau of Buildings from granting certain building permits. The court held that where an application and plans complied with all provisions of the law the Superintendent cannot arbitrarily refuse the permit. The court said:

> "The Greater New York charter (Secs. 406, 411) prescribes the duties and powers of the superintendent of buildings. He must, subject to the provisions of law and ordinance, pass upon the mode and manner of construction and of materials to be used in buildings. He cannot arbitrarily refuse a permit nor should he refuse it when the application and plans filed comply with all provisions of law. *City of New York* vs. *Stewart Realty Co.,* 109 App. Div. 702; *People ex rel. Swain* vs. *Reville,* 50 Misc. Rep. 474; *City of Buffalo* vs. *Kellner,* 90 *id.* 407, 416. * * * *The cases already cited show that the Superintendent can be compelled to grant permits where the applications and plans conform to law.*"

In *People ex rel. Swain* vs. *Reville,* 50 N. Y. Miscellaneous 474, the Supreme Court at New York Special Term arrived at the same result where the superintendent refused approval of a permit for the erection of a house on grounds which the court

passed upon and declared invalid. A writ of peremptory mandamus was granted. Mr. Justice Scott said:

> "I am therefore of opinion that a peremptory mandamus must issue to the respondent requiring him to approve the plans and specifications."

Thus, if the plans submitted comply with the law the defendant can be compelled to approve and grant a permit. Thus, if this Court finds that the provisions of the Zoning Resolution, solely by reason of which the defendant-in-error has refused to grant a permit, are invalid, then it must follow such refusal is arbitrary and unjustified, and he may be compelled by mandamus to grant a permit.

III.

The Zoning Ordinance of the City of New York, in so far as the E area district provisions of the same are applicable to the property of plaintiff-in-error, is an invalid exercise of the police power and violates the Fourteenth Amendment to the Constitution of the United States by depriving plaintiff-in-error of its property without due process of law and denying the equal protection of the laws.

The authority to pass the Zoning Ordinance or Resolutions was given to the Board of Estimate and Apportionment of The City of New York by the Legislature of the State of New York by way

of an amendment to the Greater New York Charter (Sections 242*a* and 242*b*, N. Y. Laws 1916, Chap. 497).

"Sec. 242*a*. The board of estimate and apportionment shall have power to regulate and limit the height and bulk of buildings hereafter erected and to regulate and determine the area of yards, courts and other open spaces. The board may divide the city into districts of such number, shape and area as it may deem best suited to carry out the purposes of this section. The regulations as to the height and bulk of buildings and the area of yards, courts and other open spaces shall be uniform for each class of buildings throughout each district. The regulations in one or more districts may differ from those in other districts. Such regulations shall be designed to secure safety from fire and other dangers and to promote the public health and welfare, including, so far as conditions may permit, provision for adequate light, air and convenience of access. The board shall pay reasonable regard to the character of buildings erected in each district, the value of the land and the use to which it may be put to the end that such regulations may promote public health, safety and welfare and the most desirable use for which the land of each district may be adapted and may tend to conserve the value of buildings and enhance the value of the land throughout the city. The board shall appoint a commission to recommend the boundaries of districts and appropriate regulations to be enforced therein. Such commission shall make a tentative report and hold public hearings thereon at such times and places as said board shall require before submitting its final report. Said board shall not determine the boundaries of any district nor impose any regulation until after the final report of a commission so appointed. After such final report said board shall afford persons

interested an opportunity to be heard at a time and place to be specified in a notice of hearing to be published for ten consecutive days in the City Record. The board may from time to time after public notice and hearing amend, supplement or change said regulations or districts but in case a protest against a proposed amendment, supplement or change be presented, duly signed and acknowledged by the owners of twenty per centum or more of the frontage proposed to be altered, or by the owners of twenty per centum of the frontage immediately in the rear thereof, or by the owners of twenty per centum of the frontage directly opposite the frontage proposed to be altered, such amendment shall not be passed except by a unanimous vote of the board.

* * * * *

Sec. 242*b*. The board of estimate and apportionment may regulate and restrict the location of trades and industries and the location of buildings designed for specified uses, and may divide the city into districts of such number, shape and area as it may deem best suited to carry out the purposes of this section. For each such district regulations may be imposed designating the trades and industries that shall be excluded or subjected to special regulations and designating the uses for which buildings may not be erected or altered. Such regulations shall be designed to promote the public health, safety and general welfare. The board shall give reasonable consideration, among other things to the character of the district, its peculiar suitability for particular uses, the conservation of property values, and the direction of building development in accord with a well considered plan. The board shall appoint a commission to recommend the boundaries of districts and appropriate regulations and restrictions to be imposed therein. Such commission shall make a tentative report and hold public hearings thereon before sub-

mitting its final report at such time as said board shall require. Said board shall not determine the boundaries of any district nor impose any regulations or restrictions until after the final report of a commission so appointed. After such final report said board shall afford persons interested an opportunity to be heard at a time and place to be specified in a notice of hearing to be published for ten consecutive days in the City Record. The board may from time to time after public notice and hearing amend, supplement or change said regulations or districts but in case a protest against a proposed amendment, supplement or change be presented, duly signed and acknowledged by the owners of twenty per centum or more of the frontage proposed to be altered, or by the owners of twenty per centum of the frontage immediately in the rear thereof, or by the owners of twenty per centum of the frontage directly opposite the frontage proposed to be altered, such amendment shall not be passed except by a unanimous vote of the board." * * *

Pursuant to the authority granted by this statute, the Board of Estimate and Apportionment on July 25, 1916, adopted the Zoning Resolution involved herein. This resolution is a long, complicated and detailed ordinance. By it, the whole of the City of New York is divided into districts of three different kinds—so-called, "use', height" and "area" districts.

The use districts, as their name indicates, have for their purpose the restriction of the use to which real property may be put in any one of them (Article II). They are, in turn, sub-divided into three classes: first, residence districts; second, business districts, and, third, unrestricted districts (Section 2).

Eight classes of buildings are mentioned which may be erected in a residence district (Sec. 3) and no others.

Again, forty-four definite uses (Sec. 4) are listed for which no building or premises may be used in a business district.

Finally, there are the unrestricted districts (Sec. 5).

The height districts, as their name indicates, have for their purpose the regulation and limitation of the height and bulk of buildings to be erected in the City of New York (Article III). There are six classes of these, called, respectively, three-quarter times districts, one times districts, one and one-quarter times districts, one and one-half times districts, two times districts and two and one-half times districts (Article III). The restrictions for each of these districts vary from the requirement in the three-quarter times district that no building shall be erected to a height in excess of three-quarters times the width of the street (Sec. 8*a*) to the requirement in the two and one-half times district that no building shall be erected to a height in excess of two and one-half times the width of the street (Sec. 8*d*). Provision is also made permitting greater height proportionate to extent of setback from the street line.

Finally, there are the area districts, which exist for the purpose of regulating and determining the area of yards, courts and other open spaces for buildings erected in the City of New York (Art. IV). These districts are the ones particularly involved in this case and they will be discussed in more detail below.

Any particular piece of land in the City of New York is, of course, located in one of each of the

several use, height and area districts. The premises of plaintiff-in-error herein involved are placed in a residence use district (Affidavit of defendant-in-error R. 17). Until the amendment of October 20, 1922, they were in a C area district; as a result of this amendment they have been placed in an E area district (R. 13; 17; Maps attached to R. 38);

Amendments and changes in districts established by the ordinance may be made by the Board of Estimate and Apportionment from time to time on its own motion or whenever the owners of 50% or more of the frontage of any district or part thereof present a petition to the Board for an amendment (Section 23). *If, however, a protest against such amendment is made by the owners of at least 20% of any frontage to be altered or by the owners of 20% of the frontage immediately in the rear thereof or directly opposite the frontage proposed to be altered, such amendment may not be passed except by the unanimous vote of the Board* (Section 23). The statute quoted above authorizing the Board of Estimate and Apportionment to adopt the ordinance expressly provides that in case a protest is made against a proposed change in district by 20% of the owners of the frontage proposed to be altered or by 20% of the owners of the frontage immediately in the rear thereof or by 20% of the owners of the frontage directly opposite the frontage proposed to be altered, such amendment shall not be passed except by unanimous vote of the Board (Greater N. Y. Charter, Sec. 242*a*; N. Y. Laws 1916, Chap. 497).

Section 23 of the Zoning Resolution further provides that "if any area is hereafter transferred to another district by a change in district boundaries by an amendment, as above provided, the provisions

of this resolution in regard to buildings or premises existing at the time of the passage of this resolution shall apply to buildings or premises existing at the time of passage of such amendment in such transferred area". The interpretation of this provision and the following Section 24 by the State courts in the case at bar has been that, even though the plans of plaintiff-in-error had been passed by the Tenement House Commissioner and were filed with the Superintendent of the Bureau of Buildings before the amendment has been made changing the area district from a "C" to an "E" district, and, although at the time of filing the plans and for a number of weeks thereafter the zone was not changed, and the only reason given by the Superintendent for withholding a permit was that a petition was pending in the Board of Estimate and Apportionment for a change of zone, yet the amended zone nevertheless applies to the plans filed as aforesaid several weeks before the amendment. Thus, the plans were filed with the Tenement House Department on July 18, 1922, approved by the same on August 31, 1922, and filed with the Superintendent of the Bureau of Buildings on Sept. 1, 1922 (R. 5 to 6). The Superintendent expressly withheld the plans pending the action of the Board of Estimate and Apportionment on a petition for change of the zone (Exhibit C., R. 13) and the Board of Estimate and Apportionment did not act until October 20, 1922 (R. 7). Two of the judges of the learned Court of Appeals dissented from this interpretation of the ordinance, but it is the one adopted by the majority of the Court (R. 54).

We now turn to a consideration, in more detail, of Article IV of the Zoning Resolution providing for area districts. By it the City of New York

is divided into six classes of such districts called A, B, C, D, E and F districts in increasing order of stringency of requirement. The purpose of the area districts is regulation of the size of yards, courts and other open spaces and limitation of the amount of a given lot which may be occupied by building.

In an A district *any court* at any given height must be at least *one inch* in least dimension for each *one foot* of height (Sec. 11).

In a B district a *rear yard* at any given height must be at least *two inches* in least dimension for each *one foot* of height and at its lowest level must be at least 10% of the depth of the lot, but need not exceed 10 feet at such level. In a B district an *outer court* or a *side yard* at any given height must be at least *one inch* in least dimension for each *one foot* of such height, and at least *one and one-half inches* in least dimension for each *one foot* of length (Sec. 12).

The provisions in respect to the C districts are as follows:

> § 13. C DISTRICT. (*a*) In a C district a *rear yard* at any given height shall be at least *three inches* in least dimension for each *one foot* of such height. The depth of a rear yard at its lowest level shall be at least 10 per cent. of the depth of the lot, but need not exceed 10 feet at such level. An *outer court* or a *side yard* at any given height shall be at least *one and one-half inches* in least dimension for each *one foot* of such height. An *outer court* at any given point shall be at least *one and one-half inches* in least dimension for each *one foot* of length. On a lot not more that 30 feet in mean width an outer court or a side yard at any given

height shall be not less than one inch in least dimension for each one foot of such height, and an inner court at any given height shall be either (1) not less than two inches in least dimension for each one foot of such height or (2) it shall be of an equivalent area as hereinafter specified in paragraph c of section 18.

(*b*) If the owner or owners of any part of a C district set aside perpetually for the joint recreational use of the residents of such part designated by them, an area at least equal to 10 per cent. of the area of such part in addition to all yard and court requirements for a B district, such part shall be subject to the regulations herein prescribed for a B district. Such joint recreational space shall be composed of one or more tracts, each of which shall be at least 40 feet in least dimension and 5,000 square feet in area and shall be approved by the Board of Appeals as suitable for the joint recreational use of such residents. (Italics ours.)

The premises in question were zoned in a C. district before the amendment of October 20, 1922 and the plans of plaintiff in error were drawn to conform and did conform with the requirements of this district (R. 5-7; 9-10).

The district next in order of stringency of restriction is the D district. In a D district a *rear yard* at any given height must be at least *four inches* in least dimension for each *one foot* of height and if a building in a D. district is located in a residence district, the depth of the rear yard at its lowest level must be at least 20% of the depth of the lot but need not exceed 20 feet at such level

(Sec. 14*a*). In a D district no building within a residence use district may occupy at curb level more than 60% of the area of the lot, if an interior lot, or 80%, if a corner lot (Sec. 14*c*).

By the amendment of October 20, 1922 the premises involved herein were placed within the E area district (R. 13). The provisions for the E area district are as follows:

> § 15. E DISTRICTS. (*a*) In an E district a rear yard at any given height shall be at least five inches in least dimension for each one foot of such height. The depth of a rear yard at its lowest level shall be at least 15 per cent. of the depth of the lot, but need not exceed 15 feet at such level. If a building in an E district is located in a residence district as designated on the amended use district map, the depth of a rear yard at its lowest level shall be at least 25 per cent. of the depth of the lot, but need not exceed 25 feet at such level. However, for each one foot in excess of 10 feet of the depth of such rear yard at its lowest level, there may be substituted one foot of depth of unoccupied space across the whole width of the front of the lot at the curb level between the street line and the street wall of the building. *In an E district on at least one side of every building located within a residence district there shall be a side yard along the side lot line for the full depth of the lot or back to the rear yard.*
>
> (*b*) In an E district an outer court or side yard at any given height shall be at least two and one-half inches in least dimension for each one foot of such height. On a lot not more than 50 feet in mean width an outer court or a

side yard at any given height shall be at least two inches in least dimension for each one foot of such height. An outer court at any given point shall be at least two and one-half inches in least dimension for each one foot of length.

(*c*) *In an E district no building located within a residence district as designated on the amended use district map shall occupy at the curb level more than 50 per cent. of the area of the lot, if an interior lot, or 70 per cent. if a corner lot, and above a level 18 feet above the curb no building shall occupy more than 30 per cent. of the area of the lot, if an interior lot, or 40 per cent. if a corner lot. In computing such percentage any part of the area of any corner lot in excess of 8,000 square feet shall be considered an interior lot.* (Italics ours.)

Since the filing of the petition herein the Zoning Ordinance has been amended by adding a provision (Section 15*d*) to the effect that *in an E area district no portion of any building shall be erected nearer than ten feet to the street line.* (Adopted January 18, 1924.)

The most severe in its limitations of all of the area district requirements is the F district. This district was not a part of the ordinance as originally adopted, but was added by amendment on July 19, 1922 *after the date of the petition filed with the Board of Estimate and Apportionment for the change of the area district in which plaintiff-in-error's property lies from a C to an E district—the most stringent then existing* (R. 12).

The provisions of the F district are as follows:

§ 15A. F DISTRICTS. (*a*) In an F district no portion of any building shall be erected

nearer than 15 feet to the building line of any street.

(*b*) In an F district a rear yard at any given height shall be at least six inches in least dimension for each one foot of such height. The depth of a rear yard at its lowest level shall be at least 20 per cent. of the depth of the lot, but need not exceed 20 feet at such level. Excepting that if a building in an F district is located in a residence district as designated on the amended use district map, the depth of a rear yard at its lowest level shall be at least 30 per cent. of the depth of the lot, but need not exceed 30 feet at such level. However, for each one foot in excess of 15 feet of the depth of such rear yard at its lowest level there may be substituted one foot of additional depth of unoccupied space to that hereinbefore provided across the whole width of the front of the lot at the curb level between the street line and the street wall of the building. In an F district, on both sides of every dwelling there shall be a side yard along the side lot line for the full depth of the lot or back to the rear yard. For every residential building located in a residence district both sides of such building shall be capable of beng afforded direct light, air and access upon such side yards for its entire length.

(*c*) In an F district an outer court or side yard at any given height shall be at least three inches in least dimension for each one foot of such height, excepting that on a lot not more than 50 feet in mean width an outer court or a side yard at any given height shall be at least two and one-half inches in least dimension for each one foot of such height. An outer court

at any given point shall be at least three inches in least dimension for each one foot of length.

(*d*) In an F district no building shall occupy at the curb level more than 35 per cent. of the area of the lot, if an interior lot, or 50 per cent. if a corner lot, and above a level 18 feet above the curb no building shall occupy more than 25 per cent. of the area of the lot, if an interior lot, or 30 per cent. if a corner lot, exclusive in each case of garages. In computing such percentage any part of the area of any corner lot in excess of 6,000 square feet shall be considered an interior lot.

Section 16 makes detailed provision for rear yards and Section 17 for courts.

Attention is respectfully called particularly to the E district provision (Section 15c) *which limits the area of a given lot upon which a building may be located to 50% of the area of the lot if an interior lot or 70%, if a corner lot, below the height of 18 feet, and above the height of 18 feet above the curb level, to 30% of the area of the lot, if an interior lot, and 40%, if a corner lot.* In computing such percentage, any part of the area of any corner lot in excess of 8000 square feet is considered an interior lot. The premises of plaintiff-in-error involved herein are 100 x 100 in dimension and, hence, 2000 square feet in excess of 8000 square feet. The affidavit of the architect who drew the plans for the proposed apartment house shows that *under the restrictions of the E area district, petitioner could cover only 6600 square feet of the lot on the first floor and 3800 square feet on the upper floors, namely, 61% and 35% of the total area respectively, whereas, under the regulations of the C area district, petitioner could cover 90% of the area of the lot* (R. 10).

Attention is also called to the further requirement *that in an E district located within a residence use district there must be on at least one side of every building a side yard along the side lot line the full depth of the lot* (Sec. 15*a*, Map, R 42). In a lot more than 50 feet in mean width this yard at any given height must be at least *two inches in least dimension* for each *one foot* of such height (Section 15*b*).

A.

It is clear from a reading of the statute and ordinance that it is intended to be an exercise of the police power.

The statute (Greater N. Y. Charter, N. Y. Laws 1916, Chap. 497), already referred to as the authority under which the Board of Estimate and Apportionment of The City of New York passed the Zoning Resolution, provides as follows:

> "Such regulations shall be designed to secure safety from fire and other dangers and to promote the public health and welfare, including, so far as conditions may permit, provision for adequate light, air and convenience of access".

Article X, Section 19 of the Zoning Resolution reads as follows:

> "In interpreting and applying the provisions of this resolution they shall be held to be the minimum requirements adopted for the promotion of the public health, safety, comfort, convenience and general welfare."

The ordinance contains no provision whatsoever for compensation to owners of property, restricted by even the most severe of its numerous and detailed provisions.

B.

The purpose of the restrictions of the E area district is to create or preserve by means of segregation highly restricted residential developments dedicated to detached or semidetached dwellings and to prohibit apartment houses.

The purpose of the E area districts is to create or preserve the so-called highly restricted residential developments, consisting of detached dwelling houses, surrounded by lawns and large yards, and to bar from such districts apartment houses. This appears clearly from a reading of the provisions of the ordinance creating the E area district, already quoted. In particular, Section 15c provides that in an E district located *within a residence district* no building shall occupy at the curb level more than 50% of the area of the lot, if an interior lot, or 70% if a corner lot, and above the level of 18 feet, no building shall occupy more than 30% of the area of the lot, if an interior lot or 40% if a corner lot. In computing such percentage any part of the area of any corner lot in excess of 8000 square feet is considered an interior lot. *As applied to the property of plaintiff in error, this restriction permits it to occupy at curb level only 61% of its lot, namely, 6600 square feet, below the height of 18 feet and 35% of the lot, or 3800 square feet, on the upper floors; whereas, under the regulations of the C area district it could construct on 90% of the area of the lot* (R. 10). *In addition, there is the provision that in an E area district on at least one side of every building there must be a side yard along the side lot line for the full depth of the lot or back to the rear yard* (Sec. 15*a*) two inches in

the least dimension for each foot of height where the lot is more than 50 feet wide (Sec. 15*b*). *Thus the provisions of the resolution guarantee that in an E area district one-half of the land must be left vacant at the ground level and considerably more than on-half above the height of 18 feet.* The second floor, moreover, must, on an interior lot cover 20% less area than the first floor, and, on a corner lot, 30% less area than the first floor. In the case at bar, inasmuch as the lot is classified partly as a corner and partly as an interior lot, being more than 8000 square feet in area, the second floor must cover 26% less area than the first floor. *These provisions make a building of any other dwelling construction than the detached or semidetached house commercially impracticable.*

One of the drafters of the resolution, Edward M. Bassett, Esq., has frankly expressed this purpose in a pamphlet entitled "Zoning" prepared under the auspices of the National Municipal League (Technical pamphlet series No. 5, revised 1922, at page 322). The author is a member of the New York Bar, counsel to the Zoning Commission and Chairman to the Commission which drafted the resolution. Mr. Bassett writes:

> "The E Zones of New York or Zones corresponding to them in other cities that have adopted zoning have been considered one of the most important results of the new movement *because they perpetuate the highly restricted residential developments.*" (Italics ours.) (R. 12.)

The report of the Committee on City Plan and Public Improvements submitted to the Board of Estimate and Apportionment, wherein it recommended to that body the amendment to the reso-

lution of October 20, 1922, bringing the premises involved within an E area district, clearly shows this purpose.

> On the use district map East 10th Street is located in a residence district in the section now under consideration and a similar designation applies to a large adjoining area upon the south and west, but Coney Island Avenue, the adjacent street on the east, is designated for business use. *On the area district map nearly all of the section affected by the petition is located in a "C" district, which is appropriate for an apartment house development.* Exceptions to this designation exist in the case of both westerly corners of Avenue I and Avenue J, which are located in an "E" area district forming a part of a considerable similar area in this vicinity lying to the west of East 10th Street. *The "E" area district is particularly appropriate for detached or semi-detached dwellings.*
>
> An inspection shows that the property to which the petition relates is almost fully improved with detached dwellings. (R. 12; italics ours.)

The record shows that the prohibition of apartment houses is the reason why the intervenors—defendants-in-error—caused the E area amendment to be made. As has been stated, before January 1, 1923, the property in question was subject to restrictive covenants which expired on that day (See pages 6 to 7 *supra*) (R. 24, 29), requiring a 20 feet set back on Avenue J. and East 10th Street, and approval of building plans by a certain Greater New York Development Company. The amendment to the Zoning Ordinance was passed on October 20, 1922, immediately before the expiration, by their terms, of these restrictive covenants and

the petition filed by the property owners forming the Midwood Manor Association, intervenor defendant in error, upon which the Board of Estimate and Apportionment acted in amending the Zoning Resolution, shows clearly *that the purpose of the amendment was to continue these restrictions and to prevent the erection of apartments.* The petition is part of the record and reads as follows:

> "WHEREAS, East 10th Street in Midwood Manor, Brooklyn, has for the past 15 years been adorned with beautiful homes and said street is one of the prominent thoroughfare of Midwood Manor, and is picturesque because of its trees, flowers and shrubbery, and whereas, Midwood Manor Association spends yearly a large sum of money in the upkeep of said street, said Association employing 4 gardeners to look after the trees, flowers, grass and shrubbery, and whereas, *the present Midwood Manor restrictions prohibit apartment houses on said 10th St., but said restrictions expire January 1st, 1923, and whereas, on account of the present zoning law, it will be possible after January 1st, 1923, to erect apartments on certain lots in East 10th St., in said Manor, thereby spoiling the beauty and desirability of East 10th St., as residential street in said Manor,* and depreciating greatly the values of the houses on said 10th St., and causing immeasurable damage to the other costly homes in Midwood Manor." (Italics ours.) (R. 39, 40.)

As stated in the affidavit of Gaston Koch, who alleges that he is President of the Midwood Manor Association, intervenor defendant-in-error (R. 33) it was the understanding of the property owners of the so-called "Midwood Manor" that under the restrictive covenants "no buildings could be erected

within the said Midwood Manor for apartment houses on the said lot in view of the setback hereinafter set forth; and that any building erected on the northeast corner of East 10th Street and Avenue J. is subject to a 20 foot setback" (R. 34). This affidavit was submitted in the injunction action, mentioned above, brought by Pauline R. Kalvin, intervenor defendant in error, to restrain violation of these restrictive covenants. It contains the further statement:

> "That upon information and belief a petition has been filed with the Board of Estimate and Apportionment petitioning that the territory located on East 10th Street between the Long Island Railroad cut and Avenue K, be changed from the C Zone to the E Zone, *which in effect means that whereas this territory now being in the C Zone permits of the construction of apartment houses, by changing it to E Zone, which requires that only 50 per cent. of the land can be utilized in the construction of a building up to 18 feet above the ground and then 30 per cent. of the area above 18 feet. This will make it commercially impractical for the construction of apartment houses.*
>
> *That the purpose of filing this petition was to carry out the general scheme in the lay-out of the tract of land which is known as Midwood Manor, so that the property will be restricted to only one and two family houses.*" (R. 35, italics ours.)

What was formerly done under voluntary covenants running with the lands, to which the predecessors in title of plaintiff in error had consented for a limited term of years, is now being accomplished by legislative action without compensation of any sort to the plaintiff in error and to a much greater extent than was true before the expiration of the covenants.

The language of the provisions creating the E area district and the form of the restriction show that it was intended to perpetuate "highly restricted residential developments." This is shown as much by what it does not do, as by what it purports to do. *It does not prohibit apartment buildings as such, and create one-family districts and apartment house districts,*—(as many zoning ordinances do); *it does not require that a certain specified number of feet of land must be left vacant.* It merely fixes a percentage of the lot upon which a given building is constructed which must remain unoccupied (Section 15*c*). How large an area this will be, in any particular case, will, of course, depend solely on the size of the lot. There is nothing to prevent the building of apartment houses, but the framers of the resolution well knew that the desired result would be attained because, as appears from the excerpts from the record, quoted above, an apartment house under the circumstances could not pay because the wastage of land would be too great. In the case at bar, for instance, 4,400 square feet would have to remain unoccupied below the height of 18 feet, and, above that, 6,200 square feet would have to be sacrificed (p. 10). Incidentally, and, as will be again pointed out below, these restrictions will likewise prevent *the building of houses, too small, to be in good taste* in a highly restricted residential development. On an average lot of 20 feet x 100 feet (see maps, R. 43) it would not appear to be possible to build a dwelling worth erecting. When, in addition, the requirements of the rear yard and side yard are considered (Section 15*a*), and the recent amendment, requiring a set-back of ten feet from the street line (Section 15*d*), the nature of the result desired can not remain in doubt.

C.

The restrictions forming the E area district are not and cannot be justified as being passed for the purpose of discouraging the building of apartment houses in general and for the purpose of bringing about better living conditions for those now dwelling in apartment houses.

It cannot be contended successfully that the purpose of the restrictions forming the E area district or the general scheme of the Zoning Resolution is to discourage the building of apartment houses in general. It is clear that it was not the idea of the legislature that apartment houses in themselves are evil and the construction of them ought to be discouraged, because the provisions of the B and C area districts clearly permit such construction, (R. 12) and, if the premises of the plaintiff in error had been permitted to remain in a C area district, construction of the apartment houses in question would have been possible under the law. Judicial notice may be taken of the fact that in our larger cities, and especially in The City of New York, apartment houses are eminently useful and house millions of people. In fact, they are the only present existing means by which the vast population of our large cities can be safely and comfortably housed in the necessarily comparatively small geographical area with convenient access to the business districts in which they find employment. The modern apartment house is entirely sanitary, light, and because of the nature of the materials of which it must be constructed, less of a fire risk than the detached dwelling. The purpose of the Zoning Resolution is not to attempt to restrict this eminently useful and entirely safe

class of dwelling house. The restrictions of the E area district are not for the benefit of those who now dwell in apartment houses and to discourage congestion, but solely for the benefit of property owners of the more pretentious residential neighborhoods, with which, it is feared, the architecture of this class of construction might not harmonize. *The ordinance does not prevent congestion; it encourages it by segregating districts in which the large population, which dwells in apartment houses, must live.*

D.

The nature of the restrictions involved is not regulatory but confiscatory.

The ordinance prohibits without compensation occupation of certain large percentages of a given lot (Sec. 15*c*). It is no compensation to the plaintiff-in-error that other premises in the City of New York are not so restricted and that there are other lots in the City of New York upon which apartment houses may be built, as is sometimes argued. *The value and the use of this particular property belonging to plaintiff-in-error is diminished by this ordinance, and, it is of no advantage to him, that there are other lots in the City which are not so limited.*

Attention is further drawn to the fact that this regulation is confiscatory and not regulatory. The ordinance does not regulate the mode of building, but it confiscates, for any and all purposes, the right to build. It does not provide that building in a certain manner is harmful to the public and, therefore, may be prohibited, but it denies entirely the right to build in any manner whatsoever upon this fixed percentage of the lot of plaintiff-in-error,

amounting to 4,400 square feet up to the height of 18 feet above the curb level and above that height amounting to 6,200 square feet (R. 10).

The distinction between an ordinance or statute which seeks to regulate and one which confiscates is clearly recognized in the recent case of *Adams* v. *Tanner*, 244 U. S. 590, and, although the facts there involved the right to engage in a certain business, the principle is the same as the one involved here.

E.

The restrictions involved are not and cannot be justified by reason of an existing emergency.

This is not an extreme exercise of the police power justified by reason of an existing emergency which requires extreme measures. On the contrary, it is said to be a plan for the development of the City, contemplated to take into consideration the growth and changes which are likely to take place in the course of a long period of time in the future. Its advocates argue that it is forward looking and is intended to provide for the future development of the City for years to come. These restrictions are intended to be permanent, not temporary, and they are not imposed by reason of any emergency.

F.

The prohibition without compensation of a use to which private property may be put is a taking and is justifiable only under a valid exercise of the police power.

The value of property is almost entirely in the uses to which it may be put. In so far as these are restricted, even though there may not be a taking

of physical possession, part of the property is lost and the extent of confiscation is proportionate to the extent of the restriction of the total uses. In this case, as has already been observed, the extent of the limitation is very broad. Not only is this property restricted to residence use purposes and the building upon it restricted to a certain height, but by the provisions of the E area district, construction is absolutely prohibited on more than one-half of the area of the lot.

In *Forster* v. *Scott*, 136 N. Y. 577, the Court of Appeals, in holding invalid a statute which, without compensation, prohibited future building upon land marked for street purposes on a map filed in certain public offices, said:

> "All that is beneficial in property arises from its use and the fruits of that use, and whatever deprives a person of them deprives him of all that is desirable or valuable in the title and possession. It is not necessary, in order to render a statute obnoxious to the restraints of the Constitution, that it must in terms or in effect authorize an actual physical taking of the property or the thing itself, so long as it affects its free use and enjoyment, or the power of disposition at the will of the owner. Though the police and other powers of government may sometimes incidentally affect property rights, according to established usages and recognized principles familiar to courts, yet even these powers are not without limitations, as they can be exercised only to promote the public good, and are always subject to judicial scrutiny. (Citing cases.)
>
> "As plaintiff in the case at bar was virtually deprived of the right to build upon his lot by the statute in question and as this circumstance obviously impaired its value and interfered with his power of disposition, it was to that extent void as to him and created no encumbrance upon it."

Again, in *Willison* v. *Cooke*, 54 Colorado, 320, the court held invalid a zoning ordinance preventing the building of a store in a residence district, and said:

> "One of the essential elements of property is the right to its unrestricted use and enjoyment, and as we have seen that use cannot be interfered with beyond what is necessary to provide for the welfare and general security of the public. Enforcing the provisions of the ordinance in question does not deprive the petitioner of his right to the lots. He would not be ousted of possession. He would still have the power to dispose of them; but although there would be no actual or physical invasion of his possession he would be deprived of the right to put them to a legitimate use which does not injure the public, and this without compensation or any provision therefor. This would clearly deprive him of his property without compensation and without due process of law, which our State and Federal constitutions not only inhibit, but which would be repugnant to justice, independent of constitutional provisions on the subject" (p. 330).

Again, in *State ex rel. Penrose Ins. Co.* v. *McKelvy*, 301 Missouri, 1, the court granted a mandamus order requiring the Building Commissioner of St. Louis to issue a permit to construct a building for manufacturing ice in a district which the local zoning ordinance limited to partly residential and partly commercial uses. The court said (p. 339):

> "It is the uses to which property may be put which give it value. Strip it of all its uses and the property is as worthless as the most barren spot in the Great Desert. Strip it of part of its legitimate uses and you have damaged it to the extent of the uses cut off. The

> restriction upon the legitimate use of property inflicted by this ordinance is a destruction of the property *pro tanto*, and there being no provision for compensation the ordinance is void" (at p. 39).

The chief use to which urban property may be put is building. This gives the land its chief value. *It has been shown that the provisions of this ordinance prevent more than half of the premises belonging to plaintiff-in-error to be used for that purpose.*

G.

Private property may not be confiscated to create or preserve by means of segregation highly restricted residential developments dedicated to use for detached and semidetached dwellings and prohibiting apartment houses.

We have already observed above that the purpose of the restrictions forming the E area district is not to discourage the building of apartment houses, as such, for these are in truth essential for the adequate housing of the great populations of our large cities. *The ordinance itself makes provision for districts in which apartment houses may be built. They are not treated as evil things in themselves.* They are not prohibited from the E area district because they involve a great fire risk or because they are unsanitary places in which to house people or because persons living in them do not receive an adequate supply of air or light. The ordinance obviously permits apartments to be built and contemplates that they will be built. The City to exist must have them.

The question remains, are they so pernicious to persons living in detached dwellings in their neighborhood that the right to build them and the right to use land for the purpose of building them may be confiscated? It is the contention of plaintiff-in-error that no such danger exists and that the only reason why the construction of these buildings in the E area districts is sought to be prohibited is a supposed æsthetic one. How does an apartment house make a neighborhood unwholesome for persons living in single houses in its vicinity? There is no appreciable increase in the fire risk. If anything, the fire risk is less, for apartments are required by law to be built of fire resisting material. Besides, the plan contemplated by the ordinance looks to great segregated sections consisting of nothing but apartment houses, and if this type of building involves a fire risk, the risk is increased rather than diminished by concentrating construction in this fashion.

The C area district, under which this apartment might have been built, assured to the neighboring property owners air and light. It is absurd on its face, to say that an apartment makes a neighborhood unsanitary by depriving persons living in its vicinity of sufficient air and light for a wholesome existence. Again, the argument may be made that under the very plan contemplated by this ordinance, apartments are to be segregated in great districts, and if the type of building may deprive persons living in its neighborhood of sufficient air and light, the peril would be increased by the segregation rather than decreased. The resulting addition to the population of the neighborhood and perhaps the additional noise incident to the increase of the number of persons living in the dis-

trict is not such as to make the life of the persons around them unhappy or unwholesome, and bears no such relation to the public welfare, in particular, as justifies the taking of another's property without compensation. There surely is nothing to justify the public in confiscating property under the police power. The distinction between the police power and the power of eminent domain must clearly be kept in view. The police power may be used only, as it were, by the public in self-defense to blot out an evil, not to obtain a benefit. *Under our Constitution, it is a fundamental doctrine that the public, like each of the individuals which make it up, must pay for what it gets.* Besides, people who live in large cities assume the risk of living amongst many people.

In *People ex rel. Weinburgh* v. *Murphy*, 195 N. Y. 126, the Court of Appeals of the State of New York held unconstitutional a section of the Building Code which limited the height of a sky sign to 9 feet above the front of a building and prohibited higher signs, no matter how well secured. The court said at page 135:

> "It has been said that the police power of a municipality is allied to the right of self-preservation in an individual. In exercising such power or right, the purpose thereof and the limitations thereon should not be forgotten."

The court held it was an invalid exercise of the police power to prevent or restrict a lawful business simply because it had been extended until it became offensive to good taste.

Again, in *Spann* v. *Dallas*, 111 Texas, 350, 357, where the Supreme Court of Texas held unconstitutional a law by which the City of Dallas sought

to create residence districts, in which no stores might be erected, it was said:

> "*The police power is founded in public necessity, and only public necessity can justify its exercise.* The result of its operation is naturally, in most instances, the abridgement of private rights. Private rights are never to be sacrified to a greater extent than necessary. Therefore, the return for their sacrifice through the exercise of the police power should be the attainment of some public object of sufficient necessity and importance to justly warrant the exertion of the power." (Italics ours.)

Again in a New Jersey decision, the Court stated:

> "No case has been cited, nor are we aware of any case which holds that a man may be deprived of his property because his tastes are not those of his neighbors. Æsthetic considerations are a matter of luxury and indulgence rather than of necessity, and *it is necessity alone which justifies the exercise of the police power to take private property without compensation.*" (Italics ours.) *Passaic* v. *Paterson Bill Posting Co.*, 72 N. J. Law, p. 285.

The distinction between the power of eminent domain and the police power must be kept clearly in mind. The public may, under the latter power, restrict the individual much further than under the power used in this case.

In *Ambler Realty Co.* v. *Village of Euclid*, 297 Fed. 307, the District Court for the Northern District of Ohio held unconstitutional the comprehensive zoning ordinance of the Village of Euclid, Ohio, on the ground that it was an invalid exercise

of the police power and in this connection said at pages 314-315:

> "Obviously, police power is not susceptible of exact definition. It would be difficult, even if it were not unwise, to attempt a more exact definition than has been given. And yet there is a wide difference between the power of eminent domain and the police power. And it is not true that the public welfare is a justification for the taking of private property for the general good. The broad language found in the books must be considered always in view of the facts, and when this is done the difficulty disappears. A law or ordinance passed under the guise of police power which invades private property, as above defined, can be sustained only when it has a real and substantial relation to the maintenance and preservation of the public peace, public order, public morals or public safety. The courts never hesitate to look through the false pretenses to the substance. As instances in which false pretenses of exercising police power in the interests of public health, safety, morals and welfare were disregarded, attention is called to Pennsylvania Coal Co. *v.* Nahon, *supra*, and Adkins *v.* Children's Hospital, *supra*. In the last case, a wider acquiescence in the assumed police power was shown than can be asserted in behalf of the power involved."

In *State ex rel. Twin Cities Building and Investment Co.* vs. *Houghton*, 144 Minnesota 1, the Supreme Court of Minnesota held constitutional *as a proper exercise of the power of eminent domain*, the zoning ordinance of the City of Minneapolis, which *provided compensation for property owners* whose premises the ordinance restricted, while the same court held unconstitutional, as an invalid exercise of the police powers, a zoning ordinance of the same

city, which attempted to impose the usual restriction found in these ordinances, *without compensation* (*State ex rel. Lachtman* vs. *Houghton*, 134 Minnesota 226).

The language of Mr. Justice Holmes in *Pennsylvania Coal Co.* vs. *Mahon*, 260 U. S. 393, is very relevant in this connection:

> "*We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a short cut through the constitutional way of paying for the change*" (260 U. S. at p. 415).

That the real objection made to the proposed construction herein has no relation to the public health, peace, safety or welfare and is solely on aesthetic grounds cannot be doubted.

The affidavit of J. George Silberstein, attorney for the Midwood Manor Association, intervenor defendant in error, interposed herein, contains the following statement:

> "The entire Midwood Manor district is now devoted solely to one and two-family detached houses surrounded by shrubs and grass plots, Avenues I and J having park spaces in the center and along the walks. These park spaces are kept up by the Midwood Manor Association at considerable expense each year and four gardeners are employed by the Midwood Manor Association for such upkeep" (R. 19).

The affidavit of Gaston Koch, president of Midwood Manor Association, intervenor herein, contains the following statement:

> "That he is the President of an Association formed by the residents of that parcel or tract of land which is commonly known as Midwood Manor and which Association is called the Mid-

wood Manor Association, and in said Association there are approximately [illegible] paid members, and that in said Midwood Manor there are approximately 600 homes. That the homes already erected and constructed in said Midwood Manor are of either one family or two family homes. That either one or two family houses are only permitted to be built on the property located [illegible] Avenue J on 7th, 8th and 9th Streets [illegible] and 10th Street between Ocean Parkway and Avenue K. That on the [illegible] between East 7th East 8th and East [illegible] between Avenues I and J and Avenue K one family houses only are permitted to be constructed. That the character of buildings in said Manor is high class, and that the value of the homes in said Manor range between $12,000 and $20,000. That since the commencement of the construction of the buildings aforesaid, as set forth in the Complaint, copy of which is hereto annexed, there has been a wave of protest coming from all the residents of said Manor and as your deponent is informed and verily believes, the rest of the property owners of said Midwood Manor purchased the property owned by them upon the understanding that the property located within the area of Midwood Manor was restricted, and that, furthermore, no buildings could be erected within the said Midwood Manor for apartment houses for the reason that it would be impractical to erected apartment houses on the said lot in view of the set-back hereinafter set forth; and that any building erected on the North-east corner of East 10th Street and Avenue J was subject to a 20-foot set-back.

That Midwood Manor is considered one of the show places in Flatbush and has as its entrance a beautiful brick gateway and flowers and shrubbery and plants of many species. That in the center of Avenue J between Coney Island Avenue and Ocean Parkway, the center of the street is parked with beautiful trees, flowers

> *and shrubbery. That the Midwood Manor Association has invested large sums of money in the upkeep of this property and at the present time is employing four gardeners to look after the said parks*" (R. 33, 34; italics ours).

The petition filed with the Board of Estimate and Apportionment by the Midwood Manor Association which resulted in the amendment to the resolution changing the area district from C to E, has already been referred to and states that

> "whereas East 10th St. in Midwood Manor, Brooklyn, has for the past 15 years been adorned with beautiful homes and said street is one of the prominent thoroughfares of Midwood Manor and is picturesque because of its trees, flowers and shrubbery and whereas Midwood Manor Association spends yearly a large sum of money in the upkeep of said street, said Association employing four gardeners to look after the trees, flowers, grass and shrubbery, and whereas the present Midwood Manor restrictions prohibit apartment houses on East 10th Street but said restrictions expire January 1, 1923, and whereas, on account of the present Zoning Law it will be possible after January 1, 1923, to erect apartments on certain lots in East 10th Street in said Manor, *thereby spoiling the beauty and desirability of East 10th Street as a residential street in said Manor* and depreciating greatly the value of said houses on said East 10th Street and causing immeasurable damage to the other costly homes in Midwood Manor" (R. 39, 40) the area district should be changed.

Nowhere is there any statement that the proposed construction is in any way unwholesome or detrimental to the welfare of the neighborhood, ex-

cept in so far as it spoils what is considered the beauty and sightliness of the neighborhood; that it will not harmonize with the architecture of the neighborhood. The petitioners point out that the street, in their opinion, is "adorned with beautiful houses", it is "picturesque because of its trees, flowers and shrubbery", for whose care four gardeners are provided. The "beauty" of E. 10th Street would be spoiled by the erection of apartment houses. This is what is meant by "spoiling" "the desirability of E. 10th Street as residential street in said Manor" (R. 39, 40). *It is not proposed to belittle the desire for "beauty", although, what that is, is always a matter of opinion, or to deny the possible attractiveness of trees, flowers, grass and lawns cared for by four gardeners. It is strenuously insisted, however, that under the constitution, the public authorities may not confiscate a man's property to obtain these desiderata, for they are obviously not necessities, to obtain which, the State is compelled in self-defense to exercise the police power.*

Again, it is apparent from the affidavit of the aforesaid Gaston Koch that attempts have been made to obtain the necessary consents to continue the restrictive covenants which expired on January 1, 1923, but that these being unavailing, or that it being felt the alternative way was easier, the petition was filed with the Board of Estimate and Apportionment, for the purpose of confiscating the uses which could not be obtained voluntarily.

In the language of Mr. Justice Holmes in *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393:

> "The question at the bottom is upon whom the loss of the change desired should fall. So far as private persons or communities have

> seen fit to take the risk of acquiring only surface rights, we cannot see that the fact that their risk has become a danger, warrants the giving to them greater rights than they bought" (p. 415).

In that case, there was involved the danger of surface ground sinking by reason of mining underneath, and the State sought by an exercise of the police power to confiscate the reserved rights of the owners of the ground underneath the surface, to mine. Here the persons who in this neighborhood built these residences, which they assert, are of such distinction and beauty, well knew of the risk of construction of buildings of a type, which did not please their taste, and, for that reason, entered into restrictive covenants, all expiring on January 1, 1923, for the purpose of restraining the undesirable type of construction. When the covenants were originally made, they might have been made without limit as to time, but the property owners chose a different course, just as in the cited case, the property holders assumed the risk of acquiring only surface rights. Here, as there, they now may not take the short cut of confiscation and obtain without payment the rights of whose exercise they assumed the risk. It is to be noted that in the cited case, there was an actual physical danger to the persons involved by reason of a possible sinking of the land, while, in the case at bar, the damage, at the most, is one to what, they suppose, is the sightliness of the neighborhood.

It is one thing for a number of individuals to agree among themselves of their own free will to restrict the uses to which their land may be put; it is quite another for the public to restrict these

uses against the will of the owners, to claim the right to confiscate these uses without compensation. Does it follow that if I consent to restrict my property for a limited number of years, that having once aided in the creation of a highly restricted residential development, I run the risk of burdening my land forever? Incidentally, the policy of such a rule would seem very discouraging to the creation of these highly restricted residential districts, which the defendants in error seem to consider so desirable. A land owner may be willing to enter into restrictive covenants for a limited time, but he will long hesitate if his consent to restrict for a limited period may, when the covenants expire, be used by the public authorities as a justification for thrusting these covenants upon him forever against his will.

In this connection it is particularly to be noted under the ordinance at bar, the modification of a restrictive district, once it has been created, is made especially difficult both by provisions of the ordinance and by the enabling act which authorized its adoption.

> "The Board may from time to time after public notice and hearing, amend, supplement or change said regulations or districts but in case of protest against a proposed amendment, supplement or change be presented duly signed and acknowledged by the owners of twenty per centum or more of the frontage proposed to be altered or by the owners of twenty per centum of the frontage immediately in the rear thereof or by the owners of twenty per centum of the frontage directly opposite the frontage proposed to be altered, such amendment shall not be passed except by a *unanimous* vote of the Board" (Greater N. Y. Charter, Sec. 242 a, N. Y. Laws 1916, Chap. 497).

This provision requiring a unanimous vote of the Board of Estimate and Apportionment where 20% of the property owners in the neighborhood object is incorporated in Section 23 of the ordinance. *Obviously the objection of a small minority of the neighboring property owners may result in the permanent continuance of such restrictions.*

The damage which the intervenors-defendants-in-error assert will be done to their property is not a true damage any more than it is a damage to A, for B to own and use an automobile, which A is desirous of having and using.

As was well said in *State ex rel. Penrose Investment Co.* v. *McKelvey*, 301 Missouri 1, *supra:*

> "It will not do to say under our constitution that a person can be deprived of the legitimate uses of his property simply because so to do might preserve the value of some other property for a certain stated use."

This was a case where it was held an ice manufacturing plant might be placed on a lot located partly in a residential, partly in a commercial district.

Again, as was said in *Marshall* vs. *City of Dallas*, 253 S. W. 887 (not officially reported), where the Texas Court of Civil Appeals sustained the City of Dallas in issuing permits for business in residence districts, which had been created by a Zoning Ordinance previously held invalid:

> "It is true that it is frequently said in the discussion of the mutual rights of adjoining property owners that each person has a right to use his property as he chooses, provided in such use he does not harm his neighbor. *Appellants seem to construe this and other similar expressions used in judicial decisions to mean*

> *that the person first in possession of property can prevent any use by subsequent and nearby property owners of their property where that use, though in every respect lawful, might be such as would lessen the market value of his property. No such meaning is intended by such expressions and they are not subject to such construction.* The harm or damage of another, referred to in said expression, is that which comes from the unlawful use of property and not from the lawful use" (at p. 889; italics ours).

That the police power may not be exercised for an aesthetic purpose, although never directly passed upon by this Court, has been repeatedly decided in the highest state courts.

In *Heller Sign Works* vs. *Physical Culture Training School,* 249 Illinois 346, the Court said:

> "These suggestions lead unmistakably to the conclusion that the statute in question is an attempt to exercise the police power purely from esthetic considerations, disassociated entirely from any relation to the public health, morals, comfort, or general welfare. However desirable it may be to encourage an appreciation of the beautiful in art, and to cultivate the taste of the people of the state, still it has never been the theory of our government that such matters could properly be enforced by statute, when not connected with the safety, comfort, health, morals and material welfare of the people. Advancement along these lines, whether wisely or unwisely, has, so far, been left to the schools and colleges and the influence of social intercourse. The citizen has always been supposed to be free to determine the style of architecture of his house, the color of the paint that he puts thereon, the number and character of trees he will plant, the style and quality of the clothes that he and his

> family will wear, and it has never been thought that the Legislature could invade private rights so far as to prescribe the course to be pursued in these and other like matters, although the public cultured may find on every street in every town and city many things that are not only open to criticism, but shocking to the esthetic taste. The courts of this country have with great unanimity held that the police power cannot interfere with private property rights for purely esthetic purposes."

In *Passaic* v. *Paterson Bill Posting Co.*, 72 N. J. Law, 285, a City Ordinance prohibited billboards constructed less than 10 feet 2 inches from the street line, and the court holding the ordinance unconstitutional, said: "It is probable that the enactment of sec. 1 of the ordinance was due rather to aesthetic considerations than to considerations of public safety. No case has been cited, nor are we aware of any case which holds that a man may be deprived of his property because his tastes are not those of his neighbors. Aesthetic considerations are a matter of luxury and indulgence rather than of necessity, and it is necessity alone which justifies the exercise of the police power to take private property without compensation."

In *Fruth* vs. *Board of Affairs*, 75 W. Va., 456; 84 S. E. 105, an ordinance, establishing a building line 25 feet from a property line, was held unconstitutional. The court said:

> "It will be found, however, we think, that no adjudged case, except the Virginia case, reversed, has ever gone so far as to hold that for mere esthetic purposes, or beauty and symmetry of streets, the state may in the exercise of its police power alone limit the owner in the use of his private property; that if

such restraint is imposed it must be done under the power of eminent domain, and not in the exercise of the police power."

People ex rel. Weinburgh, vs. *Murphy*, 195 N. Y. 126.

These principles are applied by the courts to zoning ordinances. The recent wave of zoning legislation over the country is now reaching the courts. It is believed, however, that this is the first case to come to the Supreme Court. Counsel feel that after a thorough search they can confidently state that in most of the cases zoning legislation has been held invalid. Nearly all of the cases are collected in comprehensive notes found in 19 American Law Reports Annotated 1395, and 33 American Law Reports Annotated 287. The principles involved are not novel. They are those already discussed. The question, in each instance, is, whether or not there is a sufficient relation to the public welfare to justify the exercise of the police power. Many of these cases involve attempts to build business buildings in residence districts. It is believed that these cases are even harder than the case at bar, for the harm which a store building may do in a residence district is easier to see than that which will result from an apartment. Nevertheless, this use has usually been permitted and the ordinance held invalid. No case has been found in which restrictions of the severity and nature of those involved herein have been sustained.

In *Willison* vs. *Cook*, 54 Colorado, 320, *supra*, a zoning ordinance creating residence districts was held invalid.

In *State ex rel. Westminster Presbyterian Church* vs. *Edgecomb*, 108 Nebraska, 859 (June, 1922), the Supreme Court of Nebraska held invalid

a zoning ordinance of the City of Omaha, whose framework and language appear to be very similar to the zoning ordinance of the City of New York. The particular provisions of the ordinance attacked were those creating the E Area district, which prescribed that in such a district not more than 25 per cent. of the area of a given lot might be occupied by construction. The relator desired to build a church, and the proceeding was for a mandamus order to obtain a building permit. The plans for the church would have covered thirty-seven and one-half per cent. of relator's lot. The Court held the ordinance an unreasonable exercise of the police power, and beyond the scope of the authority conferred by the legislature. The language of the enabling statute conferring authority to pass the ordinance upon the City of Omaha, as appears from the opinion, is almost identical with that of the statute under which the Board of Estimate passed the zoning ordinance of the City of New York. (Greater New York Charter, Sections 242*a* and 242*b*, New York Laws, 1916, Chap. 497).

The Court said:

> "Private property cannot be taken without compensation for public use under a police regulation relating strictly to the public health, the public morals or the public safety, any more than under a police regulation having no relation to such matters, but only to the general welfare. The foundations upon which the power rests are in every case the same. This power, as said in *Village of Carthage* vs. *Frederick*, 122 N. Y. 268, has always been exercised by municipal corporations, 'by making regulations to preserve order, to promote freedom of communication and to facilitate the transaction of business in crowded communities.' *Heller Sign Works*

vs. *Physical Culture Training School*, 249 Ill. 436, 34 L. R. A. n. s. 998, and note; In *re Opinion of the Justices*, 234 Mass. 597.

It clearly appears to us that the ordinance goes beyond the scope of authority conferred by the legislature. That part of the ordinance which confines the building area to 25% of the lot is so restrictive that it is an unreasonable exercise of the power granted by the legislature, and for that reason that part of the ordinance must be held to be invalid. The objection of the city engineer having been based solely on the requirement of that part of an ordinance which we hold to be invalid, it follows that the judgment of the district court must be, and it hereby is, in all things affirmed" (at pp. 864-865).

The case of *Ambler Realty Company* vs. *Village of Euclid*, 297 Federal, 307 (February, 1924, Westenhaver, *J.*), decided by the United States District Court for the Northern District of Ohio, has already been referred to. This was an action for an injunction to enjoin the enforcement of the zoning ordinance of the Village of Euclid, and remove the same as a cloud on the title of the complainant company, which owned a tract of unimproved and unallotted land of sixty-eight acres in extent. The zoning ordinance in question was in the usual form, dividing the village into several zones, with restrictions as to height, area and use. The plaintiff's land, 150 feet front, was zoned in a residence district for single family houses. The next 470 feet was zoned for two-family dwellings, and the next 130 feet for apartments. The remainder was zoned in a business district. The learned Court, in a long and well-considered opinion, which reviewed the authorities, and discussed the principles in-

volved, granted the decree, and enjoined the enforcement of the ordinance. We are informed by counsel in the cited case that an appeal is now pending in this Court from this decision of the District Court. The learned Court said as follows:

> "Since have been announced the decisions in *Adkins* v. *Children's Hospital*, 261 U. S. 525, 43 Sup. Ct. 394, 67 L. Ed. 785, 24 A. L. R. 1238, declaring void minimum wage law for women, and in *Wolff Co.* v. *Industrial Court*, 262 U. S. 522, 43 Sup. Ct. 630, 67 L. Ed. 1103, declaring invalid certain provisions of the Kansas Compulsory Anti-Strike Law. The principles of law therein announced, while dealing with different facts, are pertinent to the present case because of the clearly defined limitations set to the legislative disposition to extend police power until private property is destroyed and the guaranties of the Constitution are annihilated. In the light of these several decisions I am of opinion that the ordinance under consideration is, and the Supreme Court would so hold, a taking of Plaintiff's property without due process of law and that, as applied to property situated as is plaintiff's, it can be sustained, if at all, only as an exercise of the power of eminent domain, and on the condition of making just compensation.
>
> "Compare also *Eubank* v. *City of Richmond*, 226 U. S. 137, 33 Sup. Ct. 76, 57 L. Ed. 156, 42 L. R. A. (N. S.) 1123, Ann. Cas. 1914-B 192, in which an act of the Virginia Legislature sustained by the State Supreme Court providing for the establishment of uniform building lines in a single city block was held unconstitutional and void.
>
> "*Adams* v. *Tanner*, 244 U. S. 590, 37 Sup. Ct. 662, 61 L. Ed., 1336 L. R. A. 1917-F, 1163 Ann. Cas. 1917-D, 973, in which a statute of the state of Washington prohibiting employment

agencies from taking compensation for their services, was held unconstitutional and void; *Buchanan* v. *Warley*, 245 U. S. 60, 38 Sup. Ct. 16, 62 L. Ed. 149, L. R. A. 1918-C, 210 Ann. Cas. 1918-A, 1201, in which an ordinance of the city of Louisville, held by the state Supreme Court to be valid, and within the legislative power delegated to the city, districting and restricting residential blocks so that the white and colored races should be segregated, was held to be a violation of the Fourteenth Amendment and void. It seems to me that no candid mind can deny that more and stronger reasons exist having a real and substantial relation to the public peace, supporting such an ordinance than can be urged under any aspect of the police power to support the present ordinance as applied to Plaintiff's property. And no gift of second sight is required to foresee that if this Kentucky statute had been sustained, its provisions would have spread from city to city throughout the length and breadth of the land. And it is equally apparent that the next step in the exercise of police power would be to apply similar restrictions for the purpose of segregating in like manner various groups of newly arrived immigrants. The blighting of property values and the congesting of population, whenever the colored or certain foreign races invade a residential section, are so well known as to be within the judicial cognizance" (at pp. 312-313).

* * * * *

"Many state cases are cited, most of them of inferior courts. It would unduly prolong this opinion to review them, and no useful purpose would be subserved by so doing. I perceive no distinction between comprehensive zoning ordinances applied to an entire city, and zoning ordinances applied to parts only of a city, provided only that part to which the same is applied is an area sufficiently large to justify separate treatment. The principle is the same

> in both classes of cases. The police power cannot be enlarged or its nature changed by extending its operation over a wider area. In my opinion the great weight of authority, as well as sound reason, is with the cases which hold an ordinance and laws imposing restrictions such as one here involved, to be invalid, as an unreasonable taking of private property (cases cited)" (at p. 316).

Again in *State ex rel. Penrose Insurance Company* vs. *McKelvey*, 301 Missouri, 1, 256 S. W. 474 (October and November, 1923), which has likewise been referred to *supra*, the Supreme Court of Missouri granted a mandamus requiring the Building Commissioner of St. Louis to issue a permit for the construction on a lot belonging to Relator of a building for manufacturing ice, and held invalid a complicated zoning ordinance containing height, area and use restrictions, similar to the restrictions contained in the zoning ordinance of the City of New York, and undoubtedly imitated from it. This ordinance had placed the lot in question partly in a residential and partly in a commercial district. In this connection Graves, *J.*, writing for the Court, used the following forceful language:

> "First, may I say that I have never been able to depart from the idea that this is a constitutional government both in the nation and in the state and that these constitutions were intended to protect the citizen in his property rights. Unlike the 'faddest' (either public or private for there are both kinds of 'faddests') I have been unable to indorse the view, 'What is a constitution as between friends.' *In other words the constitutional inhibition must not be set aside or wiped out, by every more of popular clamor. There is too much disposition to set aside and*

ignore the organic law when there is a popular move demanding such course. It is for the courts to steady the ship of state and hold the organic law intact" (at p. 38). (Italics ours).

* * * * *

"The ordinance before us provides for the taking of private property for a public use without compensation and without a judicial hearing. It is not regulation which would fall within the reasonable exercise of the police power. It is a confiscation pure and simple. The motion for rehearing should be overruled" (at p. 41).

At the same time, that Court likewise held that the ordinance was invalid in so far as it prohibited the establishment of a rag and junk yard in a densely populated section within a district zoned as industrial, and which, under the ordinance, was possible only in an unrestricted district. (*City of St. Louis* vs. *Evraiff*, 301 Missouri. 231.) The Court in reversing the judgment of the lower Court, said: "The danger that may lurk in rags, second-hand clothing, and the like, is ample justification for the regulation of the business of dealers in such articles," (p. 249) but only so far as "reasonably necessary for the protection of the public health and comfort of society" and, "Regulations based on aesthetic considerations are not in accord with the spirit of our domestic institutions" (pp. 249-250).

This case, it is submitted, is a particularly strong one and much harder on its facts than the case at bar.

In *Fitzhugh* vs. *Jackson*, 132 Miss., 585, the Supreme Court of Mississippi held invalid a zoning ordinance of the City of Jackson creating a residence district. It was held that this ordinance was invalid in so far as it prevented the building of a

grocery store. The Court, however, expressly limited its decision to a construction of the Constitution of the State. Nevertheless, its reasoning is applicable and persuasive when applied to the Federal Constitution.

In *State ex rel. Lachtman* vs. *Houghton,* 134 Minn., 226, *supra,* the Supreme Court of Minnesota held invalid a zoning ordinance of Minneapolis, and permitted the Relator to build a store in a residence district.

The Court said as follows:

> "Only such use of property as may produce injurious consequences, or infringe the lawful rights of others, can be prohibited without violating the constitutional provision that the owner shall not be deprived of his property without due process of law, nor without compensation therefor first paid and secured" (at p. 237).

In a very recent decision, the Court of Appeals of Maryland, in an opinion, fully discussing the question on authority and principle (Goldman vs. Crowther, decided February 3rd, 1925, 128 Atlantic Reporter 50 (advance sheets April 2, 1925, not yet officially reported), held invalid the zoning ordinance of the City of Baltimore in so far as it attempted to prevent the Relator from using his premises for business purposes. The ordinance is a comprehensive one, containing complicated and detailed provisions for height, area and use districts, and is obviously drawn in imitation of the zoning ordinance of the City of New York. The ground was that it was not a valid exercise of the police power under the Constitution of the United States. The Court said:

> "But for some time past there has been a steady and constant pressure on the courts to

modify them [the settled authorities] so as to permit encroachments upon individual rights, which would not have been tolerated in earlier periods of our history, which completely justifies the comment of Mr. Justice Holmes which we have quoted.

"One of the most striking manifestations of this tendency is the great volume of so-called zoning legislation which has in recent years been written into the laws of the several States, of which the ordinance before us is an apt illustration and which subject private property to an infinite variety and number of restrictions limiting its use, many of which rest for sanction upon no more definite or substantial foundation than that they are supposed to be in the interest of general prosperity or the public convenience. That the right to hold, enjoy and use property is not absolute but subject to the police power of the State is axiomatic, 6 R. C. L. 194, and that that power may be affected by changing conditions is inevitable and unquestionable, for a use which at one time may be inoffensive and harmless may at another affect the security or the welfare of other with equal rights, and one of the sources of the police power is the *maxim sic utere tuo ut alienum non laedas*. So, property in a populous urban community may be properly subjected to restrictions which would be unreasonable and arbitrary in a thinly settled rural community, so long as the restrictions bear some definite relation to the protection of the public health, morals, safety or comfort. These principles are self-evident and are almost universally accepted, but the question before us goes much further than that, it is whether the power to hold, use and enjoy property can be restricted or taken away by the State under the guise of the police power for purely æsthetic reasons or for any such elastic and indeterminate object as the general prosperity, without compensation." (at p. 57)

In *Ignaciunas* v. *Nutley*, 125 Atlantic Rep. 121 (May, 1924, not yet officially reported), the Court of Errors and Appeals of New Jersey held that a zoning ordinance which prohibited the building of a store in a residence district was not authorized by the enabling act since it did not "promote the public health, safety and general welfare", and the enabling act authorized restrictions only if they were directed to those ends. The Court said:

> "On what theory can it be said that the restraining of the respondent from erecting a combined store and dwelling-house upon his property will tend to promote the general welfare of the community? It is probable that its presence there, without regard to its use, would be objectionable to the other property owners in the immediate neighborhood, who would prefer that business places should not be established in that part of the town. But that is quite immaterial, for such property owners have not acquired the right to impose upon owners of other property in the vicinity any restrictions upon the lawful use thereof. The ordinary use of property is not authorized by the general welfare clause of the statute to be prohibited because repugnant to the sentiments or desires of a particular class residing in the immediate neighborhood thereof, but only because such use is detrimental to the interests of the public at large. In other words, the restriction authorized by this provision of the statute upon the untrammeled use of property for the promotion of the general welfare of the community must be such as will tend in some degree to prevent harm to the public generally or to promote the common good of the whole of the people of such community" (at p. 122).

On the other hand in *Lincoln Trust Co.* v. *Williams Building Corporation*, 229 N. Y. 313, which is the decision of the New York Court of Appeals most relied on below by defendant-in-error the only question was the validity of residence use districts, —if that can be said to have been raised,—and the authorities cited would in no way justify the restrictions herein objected to.

In *Opinion of the Justices*, 234 Mass. 597, which has been much relied upon by defendant-in-error, a general enabling act was merely approved, and there was nothing said which would justify the belief that, an ordinance such as the present, which confiscates to all intents and purposes more than fifty per cent of a lot, would have been approved. In fact, it was said:

> "It is easy to imagine ordinances enacted under the assumed authority of the proposed act which would exceed the constitutional limits of the police power and be an indefensible invasion of private rights" (pp. 611-612).

Moreover, the court made this significant statement,—

> "Enhancement of the artistic attractiveness of the city or town can be considered in exercising the power conferred by the proposed act only when the dominant aim in respect to the establishment of districts based on use and construction of buildings has primary regard to other factors lawfully within the scope of the police power; and then it can be considered, not as the main purpose to be attained, but only as subservient to another or other main ends recognized as sufficient under Amendment 60 and the general principles governing the exercise of the police power" (at p. 605).

It is submitted that the dominant purpose of the restrictions objected to herein are æsthetic and not there lawfully within the scope of the police power. The framers of the E area district provisions and, as the record shows, surely the intervenors, defendants-in-error do not genuinely object to apartments, because they fear that they would affect what may be called the "wholesomeness" of the neighborhood. Certainly, it is not necessary in order to obtain "the minimum requirements adopted for the promotion of the public health, safety, comfort, convenience and general welfare", (to use the words of the ordinance, section 19) that more than half of a lot be left unoccupied (Section 15*c*). If this be true, then most of the streets in the large cities do not attain this minimum; nor, of course, do the A, B, C and D area districts created by the resolution itself. Why are these minimum requirements represented by a restriction of building to 60% of the lot in D districts (Section 14*d*); to 50% of the lot in E districts (Section 15*c*); to 35% of the lot in F districts (Section 15A(*d*))? The answer can only be that æsthetic factors are the moving cause.

The supporters of the E area district are not interested in more air or light. They want a sightly neighborhood. *They dislike houses, which are too small, as much as those which are too large.* If fifty per cent of a given lot must be left vacant below the height of eighteen feet and seventy per cent above that height (section 15(*c*)); and there must be a rear yard at least 25% of the depth of the lot at its lowest level (section 15*a*); and a side yard along the length of the lot, which must be at any given height at least two inches in least dimension for each foot of such height (section 15*a* and *b*); and under the recent amendment of the ordi-

nance in addition a set back of ten feet, a small lot could not be used for building at all, and a person in modest circumstances could, in any event, not afford the sacrifice of land. He would have to sell and move into a neighborhood where large lawns are not prescribed.

In this connection the language used in *Spann* v. *Dallas*, 111 Texas 350, *supra* is especially in point. This case held invalid the provisions of an ordinance of the city of Dallas prohibiting the erection of a store in a residence district. The court said:

> "*It would be tyranny to say to a poor man who happens to own a lot within a residence district of palatial structures, and his title subject to no servitude, that he could not erect a humble home upon it suited to his means, or that any residence he might erect must equal in grandeur those about it.* Under his constitutional rights he could erect such a structure as he pleased, so long as it was not hazardous to others. It might proclaim his poverty; it might advertise the humbleness of his station; it might stand as a speaking contrast between his financial rank and that of his neighbors. Yet it would be his "castle," and the constitution would shield him in his ownership and in its use.
>
> "If the citizen is not to be left free to determine the architecture of his own house, and the lawful and uninjurious use to which he will put it; if he is not to be permitted to use his land as he chooses without hurt to his neighbors; if, by law, he is to be allowed to do these things only as officials or the public shall decree, or as may for the time suit the taste of a part of the community, the law might as well deal candidly with him and assert that he holds his property altogether at public sufferance. It might as well

> prescribe the kind of clothes he and his family shall wear and the sort of food they shall eat. Some people are as much offended by the clothes and diet of other people as they are by the style of their houses. As a great judge has warned: 'Such legislation may invade one class of rights today and another tomorrow, and if it can be sanctioned under the Constitution, while far removed in time, we will not be far away in practical statesmanship from those ages when governmental prefects supervised the building of houses, the rearing of cattle, the sowing of seed, and the reaping of grain, and governmental ordinances regulated the movements and labors of artisans, the rate of wages, the price of food, the diet and clothing of the people, and a large range of other affairs long since in all civilized lands regarded as outside of governmental functions.' *Re Jacobs*, 98 N. Y., 98, 50 Am., Rep., 636." (at p. 359; italics ours)

This court in recent decisions has indicated the limits to which the police power may go.

See

Meyer v. *Nebraska*, 262 U. S. 390;
Adkins v. *Children's Hospital*, 261 U. S. 525;
Buchanan v. *Warley*, 245 U. S. 60;
Wolff Packing Co. v. *Industrial Court*, 262 U. S. 522;
Adams v. *Tanner*, 244 U. S. 590;
Pennsylvania Coal Co. v. *Mahon*, 260 U. S. 393.

The provisions creating the E area district have not such a relation to the public welfare as justifies the exercise of the confiscatory powers of the state.

H.

The interpretation given by the State Courts to sections 23 and 24 of the Zoning Resolution results in an illegal confiscation of the plans to conform to the C area district restrictions, prepared by plaintiff-in-error before the amendment, approved by the Tenement House Department and filed in the office of the defendant-in-error before the change in zone.

The amendment to the Zoning Resolution, not only results in the taking of the principal use to which more than half of plaintiff-in-error's land may be put, but, it also results in the illegal confiscation of the plans prepared by it to conform to the requirements of the then existing C area district. It was contended by plaintiff-in-error in the state courts that by virtue of sections 23 and 24 of the resolution, inasmuch as these plans had been filed with the Tenement House Department (July 18, 1922; R. 5), approved by it (August 31, 1922; R. 5) and filed in the office of the defendant-in-error (September 1st. R. 6), and the amendment changing the zone was not adopted until October 20, 1922 (R. 7), the amended zone should not apply to its construction. The Court of Appeals, two judges dissenting (R. 54), however, interpreted the ordinance otherwise and held that the E area district provisions applied to these premises. This necessarily resulted in a confiscation of these plans, for they are obviously useless in an E area district, as well as in the restriction of defendant-in-error's property.

I.

It is an unconstitutional use of the police power to create districts segregating persons of different economic levels.

The benefits of the Zoning Resolution from a sociological standpoint have been much insisted on. These arguments are obviously immaterial, if the ordinance transcends the police power. Speaking of them the Court of Appeals of Maryland in Goldman *v.* Crowther, 128 Atlantic Rep. 50 (not yet officially reported) *supra*, says:

> "it is sufficient to say that in our opinion we are not at liberty to examine the question from any other than a legal standpoint, and therefore we cannot be controlled in our consideration of the validity of this ordinance by its possible benefit to the public, if in point of fact that benefit is purchased by appropriating the rights and property of individuals to the public use without just compensation, and by violation of the guaranties of the state and federal constitutions" (p. 52).

In answer to these arguments, however, plaintiff-in-error desires to show that even from a sociological standpoint, the public benefits of the Zoning Ordinance are highly doubtful.

New York City is growing rapidly. Land values and uses change continually. It is common knowledge that districts a few years since either vacant, or used for residences, have become thriving business sections. Apartment houses, in particular, have grown up everywhere, and without them, the city could not have provided for its citizens. Up to the present these changes have resulted entirely from the law of supply and demand. There has been, as it were, an economic competition between

the several parts of the city. Sections in which at one time the meanest of residence were located in the course of a few years may become the abode of the wealthy. The effect of an ordinance such as the one under consideration, however, is to place the city in a straight-jacket, to inject paternalism into the normal growth of the city, to stamp certain sections wth a given character, and to guarantee that the impression given will not change. Without receiving any compensation, a person owning land in a residence district is deprived of the opportunity ever to obtain for it commercal development and commercial values; and again, persons owning land in the slums are in practical effect deprived of the opportunity of ever improving the character of the neighborhood.

Referring to this situation the Court of Appeals of Maryland in *Goldman* v. *Crowther, supra,* observes,—

> "This ordinance at a stroke arrests the process of natural evolution and growth, substitutes for it an artificial and arbitrary plan of segregation under which the landowner may only use his property for certain designated purposes, and under which he may be forbidden to use it for the only purpose for which it is adapted and most valuable" (121 Atlantic Rep. 50, 53)

Are we prepared thus to arrest the natural growth of our cities; to substitute for the law of supply and demand, which it has been our experience is highly beneficial in most human activities, and which the courts have sought to protect,—for one of paternalism, restriction and regulation by the State?

Under this ordinance, once a district is given a

certain character it cannot be changed, provided only twenty per cent. of the neighboring property owners object, without the *unanimous* approval of the Board of Estimate and Apportionment (Section 23). This will be an effective check upon the normal change in the character of a neighborhood. It will, in addition, easily give rise to abuse and oppression. The comment of Judge Graves in *State ex rel., Better Built Home and Mortgage Company* v. *Davis*, 301 Missouri, 307, 311 (February, 1924), is in point. He says:

> "The fact that opposing real estate interests were back of these ordinances and paying the city expenses therein, is immaterial upon the real question involved, but is another demonstration that *the so-called public spirit back of zoning ordinances is usually the private interest of certain property owners.*" (Italics ours.)

See also *Eubank* v. *Richmond*, 226 U. S. 137,

where the granting of power of this nature to irresponsible property owners was severely criticized.

In addition grave class distinctions will be fostered by the ordinance,—always dangers in a democracy. It will greatly encourage segregation according to economic ability. We have already shown that the E area district discourages constructions of modest homes. The sacrifice of land is too great. In the F district only 35 per cent of a given area may be used (Section 15A).

In *Buchanan* v. *Warley*, 245 U. S. 60, this court disapproved of territorial segregation by race. So too, territorial segregation on lines of economic ability merits disapproval.

In *State ex rel. Twin City Building and Invest-*

ment Company vs. *Houghton*, 144 Minnesota, 13, *supra*, the Supreme Court of Minnesota held constitutional zoning, under the power of eminent domain and upon payment of compensation,—having previously held it invalid under the police power. (*State ex rel. Lachtman* v. *Houghton*, 134 Minnesota, 226, *supra*). Even to this, however, there was a very vigorous dissent, and, in his dissenting opinion Brown, *C. J.* said:

> "Heretofore the people in this country have been permitted to work out their own social relations unaided by direct legislation, and those who are willing to take cognizance for the moment of the history of civil governments and of the reasons for the downfall of many of them, cannot but be impressed that the general welfare, will best be promoted by a continuance of that method of regulating matters of that kind. This case, briefed favorably to the result by both lawyers and editors, will create no disturbance nor attract any special attention. The statute which is sustained is but a straw indicating a drifting from constitutional moorings towards class distinctions created and fostered by law" (pp. 23-24).

We conclude with the observation of Westerhaven, *J.*, in *Ambler Realty Company* v. *Euclid*, 297 Federal 307, *supra*, at p. 316:

> "The plain truth is that the true object of the ordinance in question is to place all the property in an undeveloped area of 16 square miles in a straight jacket. The purpose to be accomplished is really to regulate the mode of living of persons who may hereafter inhabit it. In the last analysis, the result to be accomplished is to classify the population and segregate them according to their income or situation in life. The true reasons why some persons live in a mansion, and others in a

shack, why some live in a single family dwelling, and others in a double family dwelling, why some live in a two-family dwelling and others in an apartment or why some live in a well-kept apartment and others in a tenement is primarily economic. It is a matter of income and wealth, plus the labor and difficulty of procuring adequate domestic service. Aside from contributing to these results and furthering such class tendencies, the ordinance has an esthetic purpose; that is to say, to make this village develop into a city along lines now conceived by the village council to be attractive and beautiful. The assertion that this ordinance may tend to prevent congestion, and thereby contribute to the health and safety, would be more substantial if provision had been or could be made for adequate east and west and north and south street highways. Whether these purposes and objects would justify the taking of plaintiff's property as and for a public use need not be considered. It is sufficient to say that, in our opinion and as applied to plaintiff's property, it may not be done without compensation under the guise of exercising the police power."

IV.

The Board of Appeals could not have afforded plaintiff-in-error an adequate remedy, and it was not necessary for plaintiff-in-error to appeal to it before applying to the courts for relief.

Section 20 of the Zoning Resolution provides as follows:

> "Where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of the provisions of this resolu-

> tion, the Board of Appeals shall have power in a specific case to vary any such provision in harmony with its general purposes and intent, so that the public health, safety, and general welfare may be secured and substantial justice done."

It has been argued that Plaintiff in Error should not be afforded relief by this Court, in accordance with the principle that mandamus will not lie where recourse has not been had to all administrative tribunals which might have granted relief. Plaintiff in Error does not quarrel with the principle. It denies, as a matter of fact, however, that any administrative tribunal exists which could grant it relief. The Board of Appeals by virtue of the section of the ordinance, quoted immediately above, has power to grant relief only in an exceptional case, "where there are *practical difficulties or unnecessary hardships* in carrying out the *strict letter* of the provisions of this resolution * * * in a *specific* case." This construction of the statute is substantiated by the case of *People ex rel. Sheldon* vs. *Board of Appeals,* 234 N. Y., 484, where the Court of Appeals, construing the jurisdiction of this body, said:

> "The authority conferred by section 7 upon the board of appeals was to 'determine and vary' the use district regulations. By section 20 to 'vary' any provision of the resolution in a specific case, where substantial justice will result therefrom. The words 'determine and vary' as used in the statute and the amended zone resolution must receive a reasonable construction.
>
> "When the instant case was before the board of appeals it was required by law to hold a public hearing on the application and appeal pending before it and as a result of the hearing

and investigation to conclude and decide the question arising thereon and thereupon to 'determine' the disposition to be made relating thereto. If as the result of investigation the board of appeals shall 'determine' as it did in this specific case, that there existed unnecessary hardships in the way of carrying out the strict letter of the provisions of the zone resolution and that substantial justice would be promoted both to the property owners and the public interest, its power then was enlarged to 'vary', *i. e.*, to modify or alter in form or substance the application of the regulations of the board of estimate and apportionment in the specific case which it did by permitting the building which the owner proposed to erect upon his lots embraced in the business district to be extended so as to cover the lots fronting on Madison Avenue."

The Board of Appeals has not, of course, the power to pass upon the constitutionality of the ordinance. It *exists only to prevent hardship in a specific case, to make exceptions in difficult cases, not to pass upon constitutionality of provisions of the ordinance.* Plaintiff in Error cannot claim that its case is one of peculiar hardship. It is, under the provisions of the ordinance, in the same position as all other property holders in E Area District. It is not asking that an exception may be made to the provisions of the ordinance. If it has a right to build the apartment house for which it has filed plans, it can do so only if the ordinance is invalid.

A precisely similar situation arose in *Matter of Municipal Gas Company* vs. *Nolan*, 121 N. Y. Miscellaneous, 606; affirmed on opinion below 208 N. Y. Appellate Division, 753. This was an application for a peremptory mandamus against the Superintendent of the Bureau of Buildings of the City of

Albany to compel him to issue a building permit for the erection of a large gas holder on property belonging to the petitioner. By an ordinance of the City of Albany no gas tank, or gas holder, was permitted within its corporate limits. It was contended, in part, by the Superintendent of the Bureau of Buildings that a right to appeal existed in behalf of the gas company from his decision to the Board of Appeals and, therefore, mandamus would not lie. This right to appeal was granted in the precise language upon which the jurisdiction of the Board of Appeals is founded in this case, namely, "where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of the law, the Board of Appeals shall have the power, in passing upon appeals, to vary and modify any rule or regulation * * *" (121 N. Y. Misc. Rep., p. 610).

The Court said as follows:

> "That, however, does not give to the board of appeals the power to absolutely nullify or pass upon the constitutionality of a city ordinance. The very spirit and purpose of the ordinance in question was to prevent absolutely, because by express language it forbids the erection of a gas container within the city limits. * * *
>
> *"Furthermore, neither the superintendent of the bureau of buildings nor the board of appeals had any power to pass upon the constitutionality of the city ordinance, and they were both bound by its provisions.* If the ordinance is invalid, then it seems that the petitioner has pursued the proper remedy in seeking a peremptory mandamus order requiring the superintendent of the bureau of buildings to receive and act upon the application of the petitioner for a permit for the erection of the gas holder." (Italics ours.)

The position of Plaintiff in Error is precisely the same herein. The Board of Appeals could have granted no relief. The law will not compel the doing of a useless thing.

Finally, attention is called to the fact that the courts below in this case have all assumed jurisdiction and refused relief "upon the law and not in the exercise of discretion". (R. 43).

V.

For these reasons, it is respectfully submitted, the judgment and order below should be reversed.

BENJAMIN REASS,
EMANUEL NEWMAN,
HUGO HIRSH,
Counsel for Plaintiff-in-Error.

QT975

Office Supreme Court
FILED
APR 2 1925
WM. R. STANSBURY

Supreme Court of the United States

OCTOBER 10, 1924.

No. 350.

THE PEOPLE OF THE STATE OF NEW YORK, *ex rel.* ROSEVALE REALTY CO., INC.,
Plaintiff-in-Error,

against

ALBERT E. KLEINERT, as Superintendent of the Bureau of Buildings of the Borough of Brooklyn, City of New York, and MIDWOOD MANOR ASSOCIATION and PAULINE R. KALVIN.

BRIEF FOR THE DEFENDANT-IN-ERROR, ALBERT E. KLEINERT.

GEORGE P. NICHOLSON,
Corporation Counsel.

CHARLES J. DRUHAN,
JOSEPH P. REILLY,
of Counsel.

Printed in the U. S. by Pandick Press, Inc., 22 Thames Street, New York

INDEX.

	PAGE
Statement	1
Facts	1-4
POINT I—The Building Zone resolution adopted by the Board of Estimate and Apportionment on July 25, 1916, as amended on October 20, 1922, does not violate the 14th Amendment of the Constitution of the United States nor deprive the plaintiff-in-error of equal protection of the laws	4-24
History Leading to Adoption of Zoning Resolution	4, 5
Character and Force of the Resolution	5, 6
Test of Validity of the Resolution	6, 7
The Object of the Resolution is Within the Purview of the Police Power	7
The Resolution is a Valid Exercise of the Police Power	8-22
Reference to Brief of the Plaintiff-in-Error	23
POINT II—The plaintiff-in-error having failed to exhaust its available remedies is not entitled to an order of mandamus	24
POINT III—Wherefore, writ obtained herein by the plaintiff-in-error should be dismissed, or the judgment appealed from should be affirmed	25

CASES CITED.

	PAGE
Atkin *v.* Kansas, 191 U. S. 207	7
Burns Baking Co. *v.* Bryan, 264 U. S. 504	6
Booth *v.* Illinois, 184 U. S. 425	7
Brown *v.* City of Los Angeles, 183 Cal. 783	7
Biggs *v.* Steinway & Sons, 229 N. Y. 320	8
Building Inspector of Lowell *v.* Stoklosa, 145 N. E. 262; 247 Mass.	8
Brett *v.* Building Commissioner of Brookline, 145 N. E. 269; 247 Mass.	16
Bedford *v.* United States, 192 U. S. 217	20
Brown *v.* Maryland, 12 Wheaton (U. S.) 419	22
City of Rochester *v.* West, 164 N. Y. 510	7
Cusack *v.* City of Chicago, 242 U. S. 526	7
City of Rochester *v.* Maccauley-Fien Milling Co., 199 N. Y. 207	7
Coates *v.* Mayor, etc. of New York, 7 Cow. 585	7
City of Des Moines *v.* Manhattan Oil Co., 193 Iowa, 1096	7, 8
Camfield *v.* United States, 167 U. S. 518	7
C. B. & Q. Railway Co. *v.* Drainage Commissioners, 200 U. S. 561	19
Douglas *v.* Noble, 261 U. S. 165	5
Erie Railroad Co. *v.* Williams, 233 U. S. 685	22
Fischer *v.* St. Louis, 194 U. S. 361	7
Gibson *v.* United States, 166 U. S. 269	20
Gundling *v.* Chicago, 177 U. S. 183	25
Gorham Manufacturing Co. *v.* State Tax Commissioners of New York, 266 U. S. 43	25
Hadacheck *v.* Sebastian, 239 U. S., 394	7, 22
In re Montgomery, 163 Cal. 457	7

PAGE

In re Kemmler, 136 U. S. 436 6

Jacobson *v.* Massachusetts, 197 U. S. 11 7

Lincoln Trust Co. *v.* Williams Building Corporation, 229 N. Y. 313 ..... 5, 8

Matter of Stubbe *v.* Adamson, 220 N. Y. 459 6
Minnesota *v.* Barber, 136 U. S. 313 6
Mugler *v.* Kansas, 123 U. S. 623 19
Meyer *v.* Richmond, 172 U. S. 82 20
Matter of Palmer *v.* Mann, 120 Misc. (N. Y.) 396 23

Opinion of the Justices, 234 Mass. 597 8
Ogden *v.* Saunders, 12 Wheaton (U. S.) 213 22

Peo. *ex rel.* Doscher *v.* Sisson, 222 N. Y. 387 6
Powell *v.* Pennsylvania, 127 U. S. 678 6
Peo. *ex rel.* Rosevale Realty Co. *v.* Kleinert, *et al.*, 237 N. Y. 580 8
Peo. *ex rel.* Sheldon *v.* Board of Appeals, 234 N. Y. 484 8
Peo. *ex rel.* Walsh *v.* Kleinert, 200 A. D. (N. Y.) 836 25
Peo. *ex rel.* Cantoni *v.* Moore, 179 A. D. (N. Y.) 121 25

Reinman *v.* City of Little Rock, 237 U. S. 171 7

Strickley *v.* Highland Boy Mining Co., 200 U. S. 527 7
Sinking Fund Cases, 99 U. S. 700 6
State *v.* City of New Orleans, 154 La. 271 ..... 6, 8
Spector *v.* Building Inspector of Milton, 145 N. E. 265; 247 Mass. 8
State *ex rel.* Carter *v.* Harper, 182 Wis. 148 9
State *ex rel.* Max Morris *v.* East Cleveland, 31 Ohio Decisions 98 15
State *ex rel.* Twin City B. & I. Co. *v.* Houghton, 144 Minn. 1 16

PAGE

State *ex rel.* Morris *v.* East Cleveland, 22 Ohio, N. P. (N. S.) 549 ..... 16, 17

Moeschen *v.* Tenement House Department of City of New York, 179 N. Y. 325; 203 U. S. 583 7

Transportation Co. *v.* Chicago, 99 U. S. 635 ..... 17, 20

United States *v.* Des Moines & Co., 142 U. S. 510 .... 6, 24

Welch *v.* Swasey, 214 U. S. 91 ..... 5, 8, 21

Ware *v.* City of Wichita, 113 Kan. 153 8

STATUTES CITED.

English Planning Act, 1909-1919 13

New York Penal Law, Section 2041 15

OTHER AUTHORITIES.

Report of Commission on Building Districts and Restrictions 5

Department of Commerce, Division of Building and Housing 8

The Law of City Planning and Zoning 10-14

Harvard Law Review, Volume 37, pp. 834, 859 14

Supreme Court of the United States

THE PEOPLE OF THE STATE OF NEW YORK, *ex rel.*, ROSEVALE REALTY CO., Plaintiff-in-Error, *versus* ALBERT E. KLEINERT, as Superintendent of the Bureau of Buildings of the Borough of Brooklyn, City of New York, and MIDWOOD MANOR ASSOCIATION, and PAULINE R. KALVIN.	IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

BRIEF OF THE DEFENDANT-IN-ERROR, ALBERT E. KLEINERT.

Statement.

This proceeding is brought before this Court upon a writ of error, obtained by the plaintiff on March 25, 1924, from Hon. Frank H. Hiscock, Chief Judge of the Court of Appeals of the State of New York (R., 47).

Facts.

Between March, 1922 and April 10, of the same year, the petitioner purchased a plot of land, 100 by 100 feet on the northeast corner of Avenue J, and East 10th Street in the Borough of Brooklyn (R., 5), subject to restrictive covenants which did not expire until January 1, 1923 (R., 18). The plot is in a section known as Midwood Manor, which was surveyed for the Greater New York

Development Co., in June, 1908 (R., 42), and the map thereof was filed in the office of the Register of the County of Kings on October 16, 1908 (R., 27). On Avenue J, each lot had a frontage of twenty feet. Not less than two lots were sold to a purchaser and not more than one residence was permitted to be erected on the two lots. At the location of the petitioner's land, each residence was required to be set back thirty feet from the building line of Avenue J, and twenty feet from the building line of East 10th Street and to cost not less than $6000.00. The development company reserved the right to require all plans and specifications to be submitted to it and to reject any building, which, in its judgment, would be detrimental to Midwood Manor (R., Map Ex.). Each residence was required to have a cellar and to be not less than two stories in height, and the deeds contained restrictions against flat roofs and many other things (R., 28). Many of the streets in the Manor were planted with flowers, trees and shrubbery and there were, at the time the petitioner purchased this land, about 600 one and two family houses in the Manor, ranging in value from $14,000 to $80,000 each (R., 33, 34).

When the petitioner purchased the plot, the zone area district of its location was "C". On July 18, 1922, and before the expiration of the restrictive covenants, the petitioner filed plans with the Tenement House Department for a forty family apartment house and such plans were approved by that Department on August 31, 1922 and then forwarded to the Bureau of Buildings (R., 5), which Bureau issued to the petitioner a temporary permit on September 1, but revoked it on September 2, 1922, upon the ground that an application had been made to change the whole locality from a "C" to an "E" area district (R., 6). On September 19, 1922, Pauline R. Kalvin, who resided in Midwood Manor, commenced an action to enjoin the petitioner from erecting its proposed apartment house (R., 18) and to enjoin the Superintendent of Build-

ings from issuing to the petitioner a permit for the erection of such building, and obtained a temporary injunction, which was, on October 20, 1922, continued *pendente lite*, against the petitioner, but vacated as to the Supertendent of Buildings (R., 19, 38, 39).

On September 22, 1922, the Board of Estimate and Apportionment referred to the Committee on City Plan and Public Improvements, the petition to change from a "C" to an "E"area district the locality in which is situated the plot of the petitioner (R., 11). On September 26, 1922, the Committee filed a report favoring and recommending such change. Thereafter, the application for such change of area district was duly advertised, and the Board of Estimate and Apportionment heard the attorney for the petitioner in opposition to the application and the attorney for the other property owners in favor of it, and then passed a resolution adopting the change, by the unanimous vote of the Board (R., 11-13), on October 20, 1922 (R., 7).

On January 26, 1923, and after the expiration of the restrictive covenants, the petitioner commenced this proceeding by obtaining an order requiring the defendant-in-error, Albert E. Kleinert, to show cause why an order of peremptory mandamus should not be granted directing him to forthwith take up, pass upon and approve the plans filed by the petitioner with him on September 1, 1922, and why he should not issue to the petitioner, a permit to erect the building described in the application and plans (R., 4-10). The Midwood Manor Association and Pauline R. Kalvin were, on motion, permitted to intervene.

On March 21, 1923, an order was made denying the application of the petitioner (R., 2-4). The petitioner appealed from such order to the Appellate Division in the Second Judicial Department (R., 2) and that Court affirmed the order (R., 42-43). The petitioner thereupon appealed to the Court of Appeals (R., 31), which

Court made an order affirming the order of the Appellate Division (R., 45). The petitioner has now appealed to this Court and claims that the Court below erred in sustaining the validity of the Building Zone resolution, adopted by the Board of Estimate and Apportionment on July 25, 1916 and its amendment of October 20, 1922, regulating and limiting the height and bulk of buildings thereafter erected and regulating and determining the area of yards, courts and other open spaces and regulating and restricting the location of trades and industries and the location of buildings designated for specified uses and establishing the boundaries and districts for said purposes (R., 46-48). The defendant-in-error contends that the ruling of the Court below is correct for the reason that the resolution in question is not violative of the Federal Constitution. In support of the defendant's contention the following is respectfully submitted for the consideration of this Court.

POINT I.

The Building Zone resolution adopted by the Board of Estimate and Apportionment on July 25, 1916, as amended on October 20, 1922, does not violate the 14th Amendment of the Constitution of the United States nor deprive the plaintiff-in-error of equal protection of the laws.

History Leading to the Adoption of the Resolution.

On February 27, 1913, a committee was appointed by the Board of Estimate and Apportionment of The City of New York to inquire into and investigate building conditions actually existing in the City and to ascertain and report whether, in their judgment, it was desirable to regulate the height, size and bulk of buildings which may thereafter be erected and to report upon the legal

right of The City of New York to regulate building in the manner proposed. On December 23, 1913, the Committee filed a voluminous report showing that it had made a broad and intelligent study of the question and recommended that the Greater New York Charter be amended by inserting therein Sections 242a and 242b. The State legislature adopted said sections by Chapter 470 of the Laws of 1914, and this legislation was approved by the Board of Estimate and Apportionment and by the Mayor. The enactment was signed by the Governor and became law in April 21, 1914. Thereafter and on May 22, 1914, the Board of Estimate and Apportionment adopted a resolution authorizing the appointment of a Commission on Building Districts and Restrictions of not less than 9 nor more than 19 members to recommend the boundaries of the Districts and appropriate regulations to be enforced therein, and such commission was appointed on June 26, 1914. The final report of said Commission was made on June 2, 1916 and was approved and adopted by the Board of Estimate and Apportionment on July 25, 1916. A copy of each of such reports is herewith respectfully submitted.

Thus, it is apparent that the building zone resolution was enacted only after a thorough, careful and scientific examination and study of the building conditions and their effect upon the health, safety, convenience and general welfare of the community had been made.

Character and Force of the Resolution.

The enactment of the Building Zone Resolution by the Board of Estimate and Apportionment does not violate the State constitution (Lincoln Trust Co. *vs.* Williams Building Corporation, 229 N. Y. 313), and such determination by the State Court should be followed by this Court (Welch *vs.* Swasey, 214 U. S. 91, 104; Strickley *vs.* Highland Boy Mining Co., 200 U. S. 527, 530; Douglas *vs.* Noble, 261 U. S. 165, 170).

The Building Zone resolution was enacted under and pursuant to sections 242a and 242b of the Greater New York Charter and has, therefore, the force and effect of a state statute (Peo. *ex rel.* Doscher *vs.* Sisson, 222 N. Y. 387, 394; Matter of Stubbe *vs.* Adamson, 220 N. Y. 459) and expert or other testimony is not admissible to show that it violates some provision of the constitution (In re Kemmler, 136 U. S. 436, 443; Matter of Stubbe *vs.* Adamson, *supra*). It must be presumed that whatever evidence was necessary to support the findings of fact required to warrant the enactment of the Building Zone Resolution was before the Board of Estimate and Apportionment before it adopted the resolution and consequently the passage thereof should be held to be equivalent to such findings (United States *vs.* Des Moines & Co., 142 U. S. 510, 544).

Test of the Validity of the Resolution.

If it cannot be made to appear that the Zoning Resolution is in conflict with the constitution, by argument deducted from the language of the resolution itself or from matters of which the Court may take judicial notice, then it must be held valid (In re *Kemmler,* 136 U. S. 436, 443). Every possible presumption in favor of the validity of the resolution must be indulged until the contrary is shown beyond reasonable doubt (Sinking Fund Cases, 99 U. S. 700, 718; Powell *vs.* Pennsylvania, 127 U. S. 678, 684; Minnesota *vs.* Barber, 136 U. S. 313, 320). If the subject of the resolution is such as comes within the cognizance of the police power and the resolution is of a character not inherently objectionable, or such as clearly transcends the bounds of reason; that is, if it is not so clearly arbitrary or capricious as to estop the Board of Estimate and Apportionment, acting reasonably, from believing it to be necessary or proper for the public health, safety, convenience or welfare, it must be sustained (Burns Baking Co. *vs.* Bryan, 264 U. S. 505, 534; State *vs.* City of New Orleans, 154 La. 271, 282;

City of Des Moines *vs.* Manhattan Oil Co., 193 Iowa 1096), and it must be upheld if it has any real or substantial relation to the objects which are sought to be regulated thereby, unless it is beyond all question, a plain, palpable invasion of a right secured by the constitution (Jacobson *vs.* Massachusetts, 197 U. S. 11, 31; Atkin *vs.* Kansas, 191 U. S. 207, 223; Booth *vs.* Illinois, 184 U. S. 425, 429).

The Object of the Resolution is Within the Purview of the Police Power.

The object of the resolution is the regulation of buildings, so as to promote health, safety, convenience and the general welfare of the public. The cases in which the police power has been legally used to serve such public purposes, through prohibition and restriction on private property and private rights, are too numerous to here recount, so reference is made only to a few of the instances where the exercise of police power in regulating or prohibiting business has been held valid: The conduct of a brick yard or kiln (Hadacheck *vs.* Sebastian, 239 U. S. 394); a dairy or cow-stable (Fisher *vs.* St. Louis, 194 U. S. 361); maintenance of a stable (Reinman *vs.* City of Little Rock, 237 U. S. 171); interment of dead bodies in the City of New York (Coates *vs.* Mayor, etc. of N. Y., 7 Cow. 585); prohibiting undertaking establishments in certain districts (Brown *vs.* City of Los Angeles, 183 Cal. 783); exclusion of lumber yard from residence district (In re Montgomery, 163 Cal. 457); installation of sinks and water closets in tenement houses (Tenement House Department of The City of New York *vs.* Moeschen, 179 N. Y. 325, affd. 203 U. S. 583); prohibiting the discharge of smoke (City of Rochester *vs.* Macauley and Fien Milling Co., 199 N. Y. 207); regulating bill-boards (Cusack *vs.* City of Chicago, 242 U. S. 526; City of Rochester *vs.* West, 164 N. Y. 510; Camfield *vs.* United States, 167 U. S. 518, 523).

The Resolution Is a Valid Exercise of Police Power.

The resolution in question was enacted on July 25, 1916 and may be described as the first comprehensive Building Zone Law adopted in this country. Since then, the wisdom of such legislation has become generally recognized and followed. According to bulletins issued in March, 1925, by the Department of Commerce, Division of Building and Housing, there were, on January 1, 1925, 320 municipalities in the United States which had effective zoning ordinances, 199 of which, like the one under review, regulate use, height and area. Many of such ordinances have been passed upon by the courts and sustained in the majority of cases. The resolution in question has been reviewed, upon various grounds, by the Supreme Court of the State of New York in the First and Second Judicial Departments, and by the Appellate Divisions of such departments and by the Court of Appeals. It has been sustained, notably in the instant case in 237 N. Y. 580; Peo. *ex rel.* Sheldon *vs.* Board of Appeals, 234 N. Y. 484; Lincoln Trust Co. *v.* Williams Building Corporation, 229 N. Y. 313, 317; and Biggs *vs.* Steinway & Sons, 229 N. Y. 320, 323.

This Court, in Welch *v.* Swasey (214 U. S. 91), held valid the Building Zone Law enacted by the City of Boston, limiting the height to which buildings could be erected in different sections in the City. In the Opinion of The Justices (234 Mass. 597), the general principles underlying the building zone laws were discussed at length and held valid. In State *v.* City of New Orleans (154 La. 271), a zoning ordinance prohibiting the erection of business houses in a residence district was held to be a valid exercise of the police power. Similar ordinances were held valid in City of Des Moines *vs.* Manhattan Oil Co. (193 Iowa 1096); Ware *v.* City of Wichita (113 Kansas 153); Building Inspector of Lowell *v.* Stoklosa (145 N. E. 262; 247 Mass. —); Spector *v.* Building Inspector of Milton (145 N. E. 265; 247 Mass. —). In

State *ex rel.* Carter *v.* Harper (182 Wis. 148), the relator found that his business of dairy and the pasteurizing of milk had outgrown the capacity of his plant and made an application for a building permit for the purpose of enlarging his building, which was denied upon the ground that, under the zoning ordinance of the City of Milwaukee, the building could not be enlarged, except to make it conform to residential use. In sustaining the ordinance, the Court said:

> "When we reflect that one has always been required to so use his property as not to injure his neighbors, and that restrictions against the use of property in urban communities have increased with changing social standards, and that the luxuries of one decade become the necessities of another, can it be said that an effort to preserve various sections of a City from intrusion on the part of institutions that are offensive to and out of harmony with the use to which such sections are devoted is unreasonable. The present standards of society prompt a revolt against such unbecoming instrusions, and they constitute such a recognized interference with the rights of the residents of such section as to justify regulation.
>
> "The benefits to be derived by the cities adopting such regulations may be summarized as follows: They attract a desirable and assure a permanent citizenship; they foster pride in and attachment to the city; they promote happiness and contentment; they stabilize the use and value of the property and promote the peace, tranquillity and good order of the City. We do not hesitate to say that the attainment of these objects affords a legitimate field for the exercise of the police power. He who owns property in such district is not deprived of its use by such regulations. He may use it for the purposes to which the section is dedicated. That he shall not be permitted to use it to the desecration of the community constitutes no unreasonable or permanent hardship and results in no unjust burden."

The premises of the petitioner are located in an "E" area district. The building which the petitioner desires to erect is a forty family apartment house. There is nothing in the building zone resolution which specifically prohibits the erection of apartment houses in such districts. But apparently the limited percentage of land which may be built upon in such districts, renders the erection of apartment houses therein unattractive to speculative and greedy builders, who strive to take the utmost profit out of their land and buildings. Despite this fact, however, it cannot be said that the erection of apartment houses in "E" area districts, with the fresh air and sunshine from the required open spaces and the nerve resting peace which naturally comes from the relative quiet of the neighborhood, would be less profitable than the buildings containing small, congested, bee-hive apartments which are commonly erected by avaricious and speculative builders. On this question, Frank Backus Williams, in a book which he published on "The Law of City Planning and Zoning," states:

> "In Alameda most of the City built up with two and a half story houses is restricted to two and a half stories. It is a significant fact in this connection that men own their own homes in Alameda as a rule, and in New York City only as a rare exception."
>
> "In this connection the work of the architect Andrew J. Thomas of New York is of interest. Some years ago Raymond Urwin, the English city planner, wrote a pamphlet for the Garden City and Town Planning Association entitled Nothing Ganied by Overcrowding (P. S. King & Son, London, 1912). Mr. Urwin shows that the effect of the developer of real estate to obtain the maximum of financial return from a given tract of building land often results in an intensive utilization of it at the expense of the amount of costly roadway so excessive as to defeat its object. Mr. Thomas has proved that nothing is gained by overbuilding. In one of the outlying boroughs of New

> York City accessible to the city center, in a zone where at most seventy per cent of interior and ninety per cent of corner lots may be covered, Mr. Thomas has built apartments five and six stories in height, covering forty-five per cent of the lot, which yield a larger net return than apartments in the same neighborhood of the same height, costing the same amount per cubic foot, on land of the same value, renting for the same price per square foot, which cover seventy per cent of the lot. In smaller units this principle also holds true although the percentage of lot area which can be covered economically may be higher. This result is due to Mr. Thomas's plan which not only gives his tenants more light, air and recreation space, but obtains the same rentable area with less gross cubage" (p. 276).

According to the census, the population of the City of New York in 1920, was 5,620,048, of which 2,284,183 were in the Borough of Manhattan, and 2,018,356 in the Borough of Brooklyn. The Borough of Manhattan is so completely and closely built up that open air and sunshine are not the abundant blessings of those who pass their daily lives in the apartments, tenements, offices, business buildings or factories in that borough. Among the millions that reside in New York City, there are necessarily many thousands who for various reasons require more air, sunshine and quiet than are obtainable in the congested parts of the City. But thousands of such persons are, by reason of family or financial or other ties, or other conditions, compelled to reside in the City. In these circumstances it seems clear that such persons may call upon the municipal authorities to so regulate housing in the city, that they may find, in some locality, the living conditions essential to their health and comfort. Such conditions are somewhat procurable in the "E" area districts.

Every conveyance of real property in the Borough of Brooklyn is required to be recorded in the office of the

register of the County of Kings. The present incumbent of that office has said that, if the construction of buildings continues in the Borough of Brooklyn at the rate of the past three years, all of the land in the borough which is now vacant will be built upon within ten years. With all of the land in the Borough of Manhattan now occupied with buildings and with a comparatively small amount of vacant land in the Borough of Brooklyn, the health, safety and general welfare make proper regulation of future building conditions mandatory. On this point Mr. Williams, in his work on zoning laws, says:

> "The fact that the one family house is less common in New York than in other communities would seem to render its protection more imperative; but the specific protection of it was omitted in the New York Ordinance, partly because they were so few and partly because it was feared that the one family district would not be supported by the courts. The latter decisions on this point given elsewhere tend to show that the New York Zoners in this respect were ultra conservative" (page 274).

The question of zoning and many of the American and European zoning laws are discussed ably and at length by Mr. Williams in his book on Zoning Laws, from which we give the following:

> "Nor is the balance between private buildings and public features the only one that must be maintained by restricting the mass of private structures. Every building—whether a residence, a store or a factory—in which human beings remain for any considerable time, requires a certain amount of open space appurtenant to it, to furnish access of light and air. Direct sun light is also most valuable. This need the public street supplies only partially, the supply from this source becoming more and more inadequate as the City grows. The bulk of buildings must, therefore, be regulated with relation to the lots on which they stand or an increase in fire hazard, anaemia, dis-

ease, accidents—especially to children playing in the streets—and juvenile delinquency, inevitably follows" (page 194).

"Bulk regulation may be divided into limitation of height and limitation of area of buildings. The fixing of the height of buildings in this way tends to keep them from cutting off light and air from the lower portions and from each other; the limitation of their area secures a certain amount of open space for the access of light and air to these buildings; and both these provisions tend to prevent the increase of intensity in the use of land and the further disturbance of the necessary balance between buildings and public improvements and utilities" (page 197).

"Modern science has established the fact that human beings need abundance of sun light and air, and freedom from nerve-racking noise, to a degree that it is impossible to obtain in the manufacturing and business parts of modern cities; and that experience, especially perhaps that of the English garden cities, tends strongly to confirm these scientific facts; which, indeed, are in accordance with common observation and common sense" (page 283).

In England, the Zoning Laws or "schemes" (outside of London) are prepared by each municipality and submitted to the Local Government Board. The power to approve such "schemes", with or without modifications, is vested in the Ministry of Health (page 501). The Canadian Zoning statutes are modeled on the English law (page 511). Both are more restrictive than the law of which the petitioner complains:

"English Planning Act of 1909-1919.—In 1919 it was amended, in many particulars, and here is summarized in its amended form. Perhaps the most important change in the law of 1909 made in 1919 is that, while formerly the preparation and adoption under it of plans by local authorities was permissive, it is now mandatory on all urban authorities who on January 1, 1923, had a population of 20,000 or over" (page 499).

"In most, if not all, the schemes there will be found provisions dividing the area into districts in which the amount of open space in proportion to buildings and the use of buildings are differently regulated. This regulation, however, is not called zoning, but the limitation of the number of houses to the acre and the allocation of particular sites for particular sorts of buildings" (page 503).

"In the limitation of the number of houses to the acre, a 'house' or 'dwelling house' is variously defined as a building designed for use of not more than one family, or as a building wholly or wholly or principally for human habitation; and in one case it is provided that any dwelling house, if designed for more than two and not more than four families, shall be recorded as two buildings, and if designed for more than four families, it shall be reckoned as three buildings. 'Acre' in this connection sometimes means net, but more usually gross, acre."

"The method of limiting the number of houses to the acre varies somewhat in the different schemes, but the principle underlying them all is the same. The provision for that purpose in the East Birmingham scheme will serve as a sufficient illustration of that general principle. In that scheme three zones were established each with an average of houses to the gross acre which in that zone as a whole must not be exceeded, the average being 12, 15 and 18; and a maximum of twenty houses to the acre was fixed which must not be exceeded on any acre within the area covered by the scheme" (page 503).

In an able and interesting article, published in Volume 37, Harvard Law Review, 834, 859, by Alfred Bettman, Esq., on the constitutionality of zoning, it is stated:

"Unless urban communities exercise by means of planning and zoning, some control for the distribution of their population and traffic and the environment in which their inhabitants live, work, and rear children, sooner or later these communities will have to choose between accepting a de-

terioration in the physical and moral caliber of their citizens or deliberately limit the growth of their population."

A more positive observation was made on the same subject, in State *ex rel.* Max Morris *v.* East Cleveland, 31 Ohio Decisions, 98, 108, by Foran, J., who said:

> "Writers of political economy contend that population is at once the end and means of human industry, and is therefore, the essence of the life of a nation. When Bacon said: 'The true greatness of a state consisteth essentially in population and breed of men,' he uttered a truth that has come thundering down the ages. Do apartment houses increase population? Do they improve the breed of men? It was formerly thought that there was a connection between marriage and prosperity, and that the former was the barometer of the latter. It may be truthfully said, however, that there ought to be a connection between marriage and children, and that the latter are the barometer of greatness. But we must concede that the apartment house has a destructive effect upon the birth-rate, and a tendency to race suicide. * * *"

The pertinency of the two preceding quotations is accentuated by the present and long existing opposition of a considerable number of the landlords in New York City to accepting as tenants, families in which there are young children. It is a fact of common knowledge that such families are unwelcome and are often actually refused as tenants in apartment houses. The discrimination against such families became so oppressive that, in an effort to check it, the penal law was amended by Chapter 298 of the Laws of 1921, which added a new section to the statute which reads as follows:

> "§2041. Discrimination against children in dwelling houses. Any person, firm or corporation in any city owning or having in charge any apartment house, tenement house or other build-

> ing used for dwelling purposes who shall refuse to rent any or part of any such building to any person or family solely on the ground that such person or family has or have a child or children shall be guilty of a misdemeanor and on conviction thereof shall be punished by a fine of not less than fifty nor more than one hundred dollars for each offense."

In Brett *v.* Building Commissioner of Brookline, 145 N. E. 269; 247 Mass. —; State *ex rel.* Twin City B. & I. Co. *v.* Houghton, 144 Minn. 1; State *ex rel.* Morris *v.* East Cleveland, 31 Ohio Decisions 98; affirmed 22 Ohio N. P. (N. S.) 549, building zone ordinances restricting the use of certain district to one family houses were held valid.

In Brett's case (*supra*), the Court, *inter alia*, said:

> "It may be a reasonable view that the health and general physical and mental welfare of society would be promoted by each family dwelling in a house by itself. Increase in fresh air, freedom for the play of children and of movement of adults, the opportunity to cultivate a bit of land, and the reduction in the spread of contagious diseases may be thought to be advanced by a general custom that each family live in a house standing by itself with its own curtilage. These features of family life are equally essential or equally advantageous for all inhabitants, whatever may be their social standing or material prosperity. There is nothing on the face of the by-law to indicate that it will not operate indifferently for the general benefit. It is a matter of common knowledge that there are in numerous districts, plans for real estate development involving modest single family dwellings within the reach as to price of the thrifty and economical of moderate wage earning capacity.
>
> The question to be decided is not whether we approve such by-law. It is whether we can pronounce it an unreasonable exercise of police power having no rational relation to the public safety,

> public health or public morals. We do not see our way clear to do that. In reaching our conclusions we are not unmindful of decisions either reaching the opposite conclusion or having a contrary appearance. * * * We think the sounder reasoning and the weight of authority support the conclusions we have reached.

Midwood Manor is a high class residential section and in 1922, had about 600 fine residences, each had a lawn; many of the streets were parked and planted with flowers, shrubbery and trees. In this almost entirely built up Manor, the petitioner seeks to erect an apartment house covering almost the entire plot. In discussing a similar situation in State *ex rel.* Morris *vs.* East Cleveland, 22 Ohio, N. P. (N. S.) 549, the Court said:

> "If the claim of the relator here is sound a City of private homes, grass plots, trees and open spaces, with the civic pride and quality of citizenship which is usually found in such circumstances, is powerless to protect itself against the obliteration of its private residence district, by apartments, which shut out the sun and sky from its streets, and one another, and generally owned by those whose greatest interest is the revenue that the building will produce. If such is the law, it must be conceded that it is unfortunate."
>
> "The apartment house, is, for many, a desirable convenience, and, for some, a necessity. They are a recognized necessity in cities of any size. Their erection could not be prohibited and, under this ordinance, are not prohibited. Private residences, with yards for play places, with grass, trees and flowers, are necessities for people with children, and as such a convenience to people without children, who take an old fashioned pride in owing their own homes, as is the apartment to those who are willing to accept its restrictions, for its compensatory freedom from responsibility. It is at least equally important to the community to preserve the private home for this class, as it

is to provide the apartment for the first. Under this zoning ordinance, both the private home is preserved and the apartment house is provided.

It seems eminently fair to restrict the apartment-house-builder to a limited area, where his use of his property will do the least damage to others, and to the community. The necessities or convenience of those who live in them will be served, thus with the least sacrifice of the necessities and convenience of others. Whatever of the burden arising from apartments there are, will be borne by those whose purposes they serve, and not shifted to the other property owners of the city to make their property unfit for use as a whole."

The petitioner, being a building corporation, knew when it purchased the land that only one family and two family detached residences could be erected thereon. It also knew that the land was, as is all land in this City, subject to the Building Zone Law and any amendment that might be made thereto. It also knew that frequent changes in district lines had been made in the law, sometimes from the greater to the lesser restrictive areas, but more often from the lesser to the greater. The E area district has been in the zoning resolutions since its enactment. The amendment thereto, made on October 20th, 1922, was the mere extension of an E area district to the territory in which the petitioner's land is located. On October 20th, 1922, when such amendment was made, the petitioner did not have the right to construct a building on its land pursuant to the regulations of a C area district. Before that right could or did arise, the amendment to the Building Zone Law was made. Therefore, the most that the petitioner had, at any time, was a prospective right which might ripen into an actual right on January 1st, 1923, when the restrictions in its deed would expire; but such prospects were defeated by the duly enacted amendment to the Building Zone Law, under which, however, the petitioner's rights are greater than they

were prior to the adoption of such amendment. The petitioner can now build a forty family apartment house in Midwood Manor; but to do so, it cannot use as large a percentage of its land as is necessary to the erection of the apartment house which it seeks to erect, under its present plans and specifications. To build an apartment house to accommodate forty families, it may be required to secure a larger plot or to increase the height of the building and the number of floors or stories thereof. Hence, the extending of the E area to the district in which the petitioner's land is located was simply a regulation of its use. Such regulation does not constitute a taking of property without due process of law. This rule is so well settled in this Court that reference is made only to a few cases.

In Muglar *vs.* Kansas (123 U. S. 623, 669), the Court said:

> "A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by anyone, for certain forbidden purposes, is prejudicial to the public interest."

In C., B. and Q. Railway Company *vs.* Drainage Commissioners (200 U. S. 561, 592), the Court said:

> "We hold that the police power of a State embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety."

If the petitioner's land suffered any diminution of value by reason of extending the E area district to such land and to the locality in which it is located, that would not invalidate the zoning resolution or the amendment thereto, nor effect their application to the petitioner's land (Gibson *vs.* United States, 166 U. S. 269, 275; Bedford *vs.* United States, 192 U. S. 217, 224; Meyer *vs.* Richmond, 172 U. S. 82, 96).

In Transportation Co. *vs.* Chicago (99 U. S. 635, 642), the Court said:

> "But acts done in the proper exercise of governmental powers and not directly encroaching upon private property, though their consequences may impair its use are universally held not to be a taking within the meaning of the constitutional provision. * * * This is supported by an immense weight of authority. Those who are curious to see the decisions will find them collected in Cooley on constitutional limitations, page 542 and notes."

The housing problem is unquestionably more complex in The City of New York than it is in any other city in the United States, and, perhaps, in any other city in the world. It is not conceivable to those unfamiliar with the life of the city. Indeed, a majority of those who reside in the city have not a fair comprehension of it. According to the reports issued by the Bureau of Buildings of the Borough of Brooklyn, for the years 1922 to 1924, inclusive, there were more residential buildings erected in that borough than in any other community in the United States, during the same period; and the reports of the Bureau of Buildings for the Borough of Queens and for the Borough of The Bronx show a tremendous increase in the erection of such buildings in said boroughs, during the same period, yet the matter of buildings, in number and kind, remains a perplexing and unsolved problem to the State and municipal authorities, and to the forward-looking public spirited citizens (such

as composed the Commission on Building Districts and Restrictions) who have given long and earnest study to the question.

The transient and permanent population of the City has grown at a pace such as to exceed the capacity of the highways and the public conveyance and transit lines and to render travel thereon a menace to the health, safety, morals and general welfare of the public. As a result thereof, it has been suggested that the number of taxicabs that may be operated on the highways be limited, and the feasibility of elevated highways to relieve traffic has been discussed. The questions of transit and housing are closely co-related or interdependent and cannot be dissociated or considered separately, as municipal problems in The City of New York. They are peculiar to the community and understandable by no one who has not made a thorough and scientific study of them. Studies of such problems are made by few who are not required to make them as an employment or as an official duty. In passing upon regulations of such matters, through the agency of the police power, this Court has always proceeded upon the presumption that the local lawmakers and the local courts are familiar with the facts and have given them full and fair consideration. This Court, therefore, has been reluctant to disturb the findings of such lawmaking bodies and courts.

In Welch *vs.* Swasey (*supra*), this Court said:

> "In passing upon questions of this character as to validity and reasonableness of a discrimination or classification in relation to limitations as to height of buildings in a large city, the matter of locality assumes an important aspect. The particular circumstances prevailing at the place or in the state where the law is to become operative; whether the statute is really adapted, regard being had to all the different and material facts, to bring about the result desired from its passage; whether it is well calculated to promote the general and public welfare, are all matters which the State court is familiar with, but a like familiarity

> cannot be ascribed to this court, assuming judicial notice may be taken of what is or ought to be generally known. For such reasons this Court, in cases of this kind, feels the greatest reluctance in interfering with the well-considered judgments of the courts of a state, where people are to be affected by the operation of the law. The highest court of the State in which statutes of the kind under consideration are passed is more familiar with the particular causes which lead to their passage (although they may be of a public nature) and with the general situation surrounding the subject matter of the legislation than this court could possibly be."

And in Hadacheck *vs.* Sebastian (*supra*), this Court, in passing upon the validity of an ordinance which prohibited the petitioner from manufacturing brick upon his own land, from a clay bed he found thereon of special worth and of great value, said:

> "the presumptions in favor of the propriety of the legislative determination, overcome the contention that the prohibition of the ordinance was a mere arbitrary invasion of private right, not supported by a tenable belief that the continuation of the business was so detrimental to the interest of others to require suppression."

Chief Justice Marshall, in Ogden *vs.* Saunders, 12 Wheaton (U. S.) 213, said:

> "It is but a decent respect to the wisdom, integrity, and the patriotism of the legislative body, by which any law is passed, to presume in favor of its validity, until its violation of the constitution is proved beyond a reasonable doubt."

In Brown *vs.* Maryland, 12 Wheaton (U. S.) 419, it is stated:

> "It has been truly said, that the presumption is in favor of every legislative act, and that the whole burthen of proof lies on him who denies its constitutionality" (Erie R. R. *vs.* Williams, 233 U. S. 685, 699).

Reference to Brief of the Plaintiff-in-Error.

On page 29 of its brief, the petitioner says that it can build upon only 61 per cent. of its lot to a height of 18 feet above the curb level and upon only 35 per cent. above such height of 18 feet. This statement is incorrect, as the architect also says that the petitioner could cover only 6600 square feet of its lot on the first floor and 3800 square feet on the upper floors. Thus, it is apparent from this statement and also from subdivision c, Section 15 of the Building Zone Resolution, that the petitioner can build upon 66 per cent. of its lot up to a height of 18 feet and upon 38 per cent. above such height of 18 feet.

The petitioner, in its brief, has stressed the reference made by Pauline R. Kalvin, Gaston Koch and J. George Silberstein, in their affidavits in this proceeding, regarding the beautiful and costly homes and the trees, flowers and shrubbery upon the lands and parked streets in Midwood Manor. From such reference the petitioner seems to find grounds for attacking the validity of the Zoning Resolution, or at least the "E" area thereof. All of such statements are in the record (R., 18-38). They were made in the year 1922, while the "E" area districts were in the Zoning Resolution when it was enacted in July, 1916. Therefore, such reference could have had nothing to do with the original adoption of the "E" area districts and it is to be presumed that the Board of Estimate and Apportionment, in 1922, was in possession of all of the information which such Board had in 1916 and of other information, if necessary, to justify the extension of the "E" area district to the locality in which the premises of the petitioner are located. This rule was applied in Matter of Palmer *v.* Mann, 120 Misc. 396, by Giegerich, J., as follows:

> "The board is not required when making changes or amendments to cover the whole field of what has been said on the subject of zoning by the

> various commissions which framed the original resolution or to prepare a voluminous preamble to every amending resolution, reciting the fire hazards and dangers to the public health and welfare, as outlined by experts in fire and health matters, when the original resolution was adopted. These are matters of which the officials are presumed to have knowledge and to have acted upon in the exercise of their judgment and discretion, with which the courts are reluctant to interfere (Peo. *v.* Charles Schweinler Press, 214 N. Y. 395; Lincoln Trust Co. *v.* Williams Building Corporation, 229 id. 313)."

Moreover, such statements or opinions of the members of the Midwood Manor Association or of other persons on its behalf cannot be considered in testing the validity of the "E" area district or its extension to the premises of the petitioner (United States *v.* Des Moines, *supra*).

POINT II.

The plaintiff-in-error having failed to exhaust its available remedies is not entitled to an order of mandamus.

Section 20 of the Building Zone Resolution, provides, in part, as follows:

> "Where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of the provisions of this resolution the Board of Appeals shall have power in a specific case to vary any such provisions in harmony with its general purpose and intent, so that the public health, safety and general welfare may be secure and substantial justice done."

The petitioner has not made application to the Board of Standards and Appeals for relief from the alleged

hardships which it claims are imposed upon it by reason of the Building Zone Resolution and thus comes within the rule stated by this Court in Gundling *v.* Chicago (177 U. S. 183, 186), as follows:

> "It is somewhat doubtful whether the plaintiff in error is in a position to raise the question of the validity of the ordinance because of the alleged arbitrary power of the mayor to grant or refuse it. He made no application for a license, and of course the mayor has not refused. *Non constat,* that he would have refused it if application had been made by the plaintiff in error. Whether the discretion of the mayor is arbitrary or not would seem to be unimportant to the plaintiff in error so long as he made no application for the exercise of that discretion in his favor and was not refused a license".

To the same effect are Peo. *ex rel.* Walsh *v.* Kleinert (200 A. D. 836), and Peo. *ex rel.* Cantoni *v.* Moore (179 A. D. 121, 123; Gorham Mfg. Co. *v.* State Tax Commis'r of New York, 266 U. S. 43).

POINT III.

Wherefore, the writ obtained herein by the plaintiff-in-error should be dismissed, or the judgment appealed from should be affirmed.

Dated, Brooklyn, New York, April 14, 1925.

GEORGE P. NICHOLSON,
Corporation Counsel.

CHARLES J. DRUHAN,
JOSEPH P. REILLY,
Of Counsel.

APR 18 192
CL

Supreme Court of the United States

OCTOBER TERM 1924.
No. 350.

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* ROSEVALE REALTY CO., INC.,
Plaintiff-in-Error,
against
ALBERT E. KLEINERT, as superintendent of the Bureau of Buildings of the Borough of Brooklyn, City of New York, and MIDWOOD MANOR ASSOCIATION and PAULINE R. KALVIN,
Defendants-in-Error.

POINTS FOR MIDWOOD MANOR ASSOCIATION AND KALVIN, DEFENDANTS-IN-ERROR

JAMES MARSHALL,
J. GEORGE SILBERSTEIN,
Of Counsel.

PRINTED IN THE UNITED STATES BY B. H. TYRREL, PRINTER, 206-8 FULTON STREET, NEW YORK.

SUBJECT INDEX.

	PAGE
STATEMENT	1-2
FACTS	3-6
POINT I. The New York Building Zone Law and the amendment thereto adopted October 20, 1922, are constitutional, and the plaintiff-in-error acquired no vested rights by violating the restrictive covenants contained in its deeds	6-118
The history of the New York Zoning Law and the economic and sociological background thereof	9-34
Summary of Zoning Resolution	34-36
The Board of Appeals	36-42
Interpretation of Building Zone Laws applied by New York Courts	42-48
Antecedents of zoning law constitutionality in New York	48-55
Analogous principles enunciated by this Court	55-87
Consideration of local conditions	60-65
Average reciprocity of advantage	76-87
Zoning Ordinances sustained in other State jurisdictions	87-94
The neighborhood affected by the amendment of October 20, 1922	94-97
The amendment of October 20, 1922, and the method of its adoption	98-104

PAGE

Plaintiff-in-error acquired no vested right to erect the tenement prior to the adoption of the amendment of October 20, 1922.....104-107
Cases distinguished.....107-115
Erroneous contentions of plaintiff-in-error 115-118

POINT II. Plaintiff-in-error has no right to challenge the constitutionality of the Building Zone Law, and is not entitled to an order of mandamus, as it has failed to apply to the Board of Appeals for a variation of the Building Zone Law 119-123

Appendix A. The Enabling Act, Chapter 601, Laws of 1917.....125-129

Appendix B. "C" zone requirements 130
"E" zone requirements 131-132

Appendix C. History of this litigation 133-136

CASES CITED.

PAGE

Adams *v.* Milwaukee, 228 U. S. 572..... 117
Ambler Realty Co. *v.* Village of Euclid, Ohio, 297 Fed. 307, *distinguished*.....112, 113
Anderson *v.* Steinway & Sons, 221 N. Y. 639 43

Bacon *v.* Walker, 204 U. S. 311..... 63
Barbier *v.* Connolly, 113 U. S. 27.....76, 79, 105
Block *v.* Hirsh, 256 U. S. 135..... 65
Biggs *v.* Steinway & Sons, 229 N. Y. 320... 42
Brett *v.* Building Comm'r of Brookline, 145 N. E. 269; 247 Mass.....5, 45, 88, 105
Building Insp. of Lowell *v.* Stoklosa, 145 N. E. 262; 247 Mass..... 88
Butters *v.* Oakland, 263 U. S. 162.....41, 101, 102
Buttfield *v.* Stranahan, 192 U. S. 470..... 42

Camfield *v.* United States, 167 U. S. 518... 73
Campbell *v.* City of Olney, 262 U. S. 352, 41, 101, 102
Chicago & Alton R. R. Co. *v.* Tranbarger, 238 U. S. 67.....83, 85, 114
C. B. & Q. Ry. Co. *v.* Drainage Comm'rs., 200 U. S. 561.....83, 91, 105, 114
City of Des Moines *v.* Manhattan Co., 184 N. W. (Ia.) 823 93
City of New Orleans *v.* Liberty Shop, 101 So. (La.), 798 93
City of New York *v.* Herdje, 68 App. Div. 370 .....51, 105
City of Rochester *v.* West, 164 N. Y. 510... 72
City of Utica *v.* Hanna, 202 App. Div. 612.. 45
Cohen *v.* Rosevale Realty Co., Inc., 121 Misc. 416, aff'd 206 App. Div. 681; 121 Misc. 618, aff'd. 45, 106, 107

PAGE

Cusack Co. *v.* City of Chicago, 242 U. S. 526 .....59, 72, 109, 113

District of Columbia *v.* Brooke, 214 U. S. 139 75

Dominion Hotel *v.* Arizona, 249 U. S. 265.. 60

Endicott-Johnson Corp. *v.* Encyclopedia Press, 266 U. S. 285 87

Eubank *v.* Richmond, 226 U. S. 137, *distinguished* 58, 101, 114

Fallbrook Irrig'n Dist. *v.* Bradley, 164 U. S. 112 76

First Nat'l Bank *v.* Weld County, 264 U. S. 450 122

Fisher *v.* St. Louis, 194 U. S. 361..... 38, 40

Fitzhugh *v.* City of Jackson, 132 Miss. 585, *distinguished* 109

Fruth *v.* Board of Affairs, 75 W. Va. 456, *distinguished* 109

Goldman *v.* Crowther, 128 Atl. (Md.) 50, *distinguished* 114

Gorham Mfg. Co. *v.* State Tax Comm., 266 U. S. 265 121

Gundling *v.* Chicago, 177 U. S. 361.....38, 120

Hadacheck *v.* Los Angeles, 239 U. S. 394 68, 105, 108, 113

Haller Sign Works *v.* Physical Culture Tr. School, 249 Ill. 436, *distinguished*..... 109

Health Dep't *v.* Rector, 145 N. Y. 32..... 49, 86

House *v.* Road Imp. Dist., 266 U. S. 175.. 41, 82

Ignaciunas *v.* Town of Nutley, 125 Atl. (N. J.) 121, *distinguished*..... 107

Jackman *v.* Rosenbaum Co., 260 U. S. 22.. 76

Jacobson *v.* Massachusetts, 197 U. S. 11... 38

PAGE

Kahn Bros. *v.* Youngstown, 25 Ohio N. P. (N. S. 1924) 31 94
Klein *v.* Maravelas, 219 N. Y. 383 95

Laurel Hill Cemetery *v.* San Francisco, 216 U. S. 358 ..... 60, 105
Levy Leasing Co. *v.* Siegel, 258 U. S. 242, 247 ..... 50, 66
Lincoln Trust Co. *v.* Williams Bldg. Corp., 229 N. Y. 313 ..... 42, 43, 87

Matter of Barker *v.* Switzer, 209 App. Div. 151 45
Matter of Cherry *v.* Isbister, 234 N. Y. 607 . 44, 105
Matter of Isenbarth *v.* Barnett, 206 App. Div. 546, aff'd 237 N. Y. 617 45
Matter of McIntosh *v.* Johnson, 211 N. Y. 265 50
Matter of Palmer *v.* Mann, 120 Misc. 396, rev'd 206 App. Div. 484 36
Matter of Kensington-Davis Corp., 239 N. Y. 54 111
Missouri Pac. R. R. Co. *v.* Road District, 266 U. S. 187 81
Mutual Film Corp. *v.* Ohio Indust. Comm., 236 U. S. 230 ..... 38, 39

New Orleans Gas Light Co. *v.* Drainage Comm. of New Orleans, 197 U. S. 453 70
New York Mutual Life Ins. Co. *v.* Armstrong, 117 U. S. 591 106
Noble State Bank *v.* Haskell, 219 U. S. 104. 76
Northern Pacific Ry. *v.* Duluth, 208 U. S. 583 70
Northwestern Laundry *v.* Des Moines, 239 U. S. 486 ..... 67, 105

PAGE

Opinion of Justices of Supreme Court of Mass., 234 Mass. 598; 127 N. E. 525.....87, 109

Pennsylvania Coal Co. *v.* Mahon, 260 U. S. 393 86

Perley *v.* North Carolina, 249 U. S. 510... 62

People *v.* Charles Schweinler Press, 214 N. Y. 395..... 54

People *v.* Havnor, 149 N. Y. 195..... 51

People ex rel. Cantoni *v.* Moore, 179 App. Div. 121 120

People ex rel. Beinert *v.* Miller, 188 App. Div. 113 47

People ex rel. Cockroft *v.* Miller, 187 App. Div. 705 47

People ex rel. Facey *v.* Leo, 230 N. Y. 602.. 47

People ex rel. Griffin *v.* The Mayor, 4 N. Y. 419 76

People ex rel. Healy *v.* Leo, 194 App. Div. 973 48

People ex rel. Helvetia Realty Co. *v.* Leo, 231 N. Y. 619..... 47

People ex rel. Kannensohn Holding Corp. *v.* Walsh, 120 Misc. 467..... 120

People ex rel. Kemp *v.* D'Oench, 111 N. Y. 359 48

People ex rel. McAvoy *v.* Leo, 109 Misc. 255 48

People ex rel. Parry *v.* Walsh, 121 Misc. 631, aff'd 209 App. Div. 889..... 47, 48

People ex rel. Publicity Leasing Co. *v.* Ludwig, 172 App. Div. 71, aff'd 218 N. Y. 540 51

People ex rel. Sheldon *v.* Board of Appeals, 234 N. Y. 484.....36, 46, 104, 120

People ex rel. Wohl *v.* Leo, 109 Misc. 448, aff'd 192 N. Y. Suppl. 945..... 48

Philadelphia Co. *v.* Stimson, 223 U. S. 605 42

PAGE

Reinman *v.* Little Rock, 237 U. S. 171 . . . 105, 108, 113
Rideout *v.* Knox, 148 Mass. 368 73
Riggs *v.* Palmer, 115 N. Y. 506 106

St. Louis *v.* Evraiff, 301 Mo. 231, *distinguished* 108
St. Louis Poster Adv. Co. *v.* St. Louis, 249 U. S. 269 . . . . . 71, 105, 116
Spann *v.* Dallas, 111 Texas 350, *distinguished* 109, 110, 111
Spector *v.* Bldg. Insp'r of Milton, 145 N. E. 265; 247 Mass 44, 88, 105
State *v.* Houghton, 144 Minn. 1, *distinguished* 111
State *v.* City of New Orleans, 97 So. (La) 440 93
State ex rel. Carter *v.* Harper, 196 N. W. (Wis.) 451 . . . . . 91, 93, 107, 116, 118
State ex rel. Lachtman *v.* Houghton, 134 Minn. 226, *distinguished* 111
State ex rel. Morris *v.* East Cleveland, 22 Ohio N. P. (N. S. 1920) 549 94
State ex rel. Penrose Invest. Co. *v.* McKelvey, 301 Mo. 1, *distinguished* 108
State ex rel. Westminster Pr. Church *v.* Edgecomb, 108 Neb. 859, *distinguished* 109

Tenement House *v.* Moeschen, 179 N. Y. 325 aff'd 203 U. S. 583 . . . . . 50, 105, 115, 118
Terminal R. R. Ass'n *v.* U. S., 266 U. S. 17 122

Union Bridge Co. *v.* United States, 204 U. S. 365 . . . . . 42, 105

Valley Farms Co. *v.* Westchester, 261 U. S. 155 41
Village of Carthage *v.* Frederick, 122 N. Y. 268 50

PAGE

Ware *v.* City of Wichita, 214 Pac. (Kas.) 99 93

Welch *v.* Swasey, 214 U. S. 91..... 38, 55, 60, 105, 113, 115

Wilson *v.* Eureka City, 173 U. S. 32..... 38, 39

Willerup *v.* Village of Hempstead, 120 Misc. 485, *distinguished* 106

Willison *v.* Cooke, 54 Colo. 320, *distinguished* 107

Wurts *v.* Hoagland, 114 U. S. 606.. 76, 78, 103, 114

Zahn *v.* Board of Public Works, City of Los Angeles (S. C. of Calif.—Feb. 27, 1925—*unreported*) 88, 104, 117

Statutes Cited.

PAGE

Amendment of October 20, 1922..... 4, 94, 98, 100, 104, 119
Building Zone Law—Resolution of July 25, 1916 ..... 5, 9
§7 37
§9 37
§18 37
§19 ..... 42, 59, 116, 117
§20 ..... 5, 38, 59, 104, 119
§21 105
§23 ..... 5, 45, 59, 99, 100, 105
§24 ..... 5, 45, 105
"B" Area District 47
"C" Area District (*Appendix* B, *page* 130) 4, 96, 98
"E" Area District (*Appendix* B, *page* 131) 4, 94, 95, 98, 115
Civil Practice Act, §193 (3) 2
Greater New York Charter (*Appendix* A, *page* 125) 10, 36, 119
Labor Law 47
Laws of 1914, Chapter 470 10
Laws of 1916, Chapter 497 10
Laws of 1917, Chapter 601 (*Enabling Act—Appendix* A, *page* 125) 5, 10, 36, 119
Standard State Zoning Enabling Act—U. S. Dep't of Commerce 7
Tenement House Laws—1901 ..... 50, 52

Other Authorities.

PAGE

Bulletins, Department of Commerce, Division of Building & Housing—March, 1925 6

Harvard Law Review, Vol. 37, page 836 *et seq.* (May, 1924) 7, 37, 73

Report of the Heights of Buildings Commission, etc. to Committee of Board of Estimate & Apportionment, December 23, 1913 10

Report of Commission on Building Districts & Restrictions, June 2, 1916 ..... 11, 15-34, 95, 96, 101, 108, 114, 115, 117

Supreme Court of the United States.

No. 350—October Term, 1924.

The People of The State of New York *ex rel.* Rosevale Realty Co., Inc., Plaintiff in Error, *vs.* Albert E. Kleinert, as superintendent of the Bureau of Buildings of the Borough of Brooklyn, City of New York, and Midwood Manor Association and Pauline R. Kalvin.	IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

BRIEF ON BEHALF OF MIDWOOD MANOR ASSOCIATION AND PAULINE R. KALVIN, INTERVENORS.

Statement.

Plaintiff-in-error applied to the Supreme Court of the State of New York, Kings County, for an order of peremptory mandamus directing Albert E. Kleinert, as Superintendent of the Bureau of Buildings of the Borough of Brooklyn, to issue a permit to it for the erection of a tenement house

for forty families on the corner of East 10th Street and Avenue J, in the Borough of Brooklyn, City of New York. This order was denied and such denial was affirmed by the Appellate Division and by the Court of Appeals.

The *opinion* of Mr. Justice Faber at Special Term is found at *Record*, page 41. The Appellate Division handed down no opinion, and the Court of Appeals only a memorandum of opinion reported in 237 N. Y. at page 580.

Upon the original argument at Special Term the Court permitted the Midwood Manor Association and Pauline R. Kalvin to intervene and they have been parties to the action at all times since (*N. Y. Civil Practice Act*, Section 193 [3]).

The Midwood Manor Association is a voluntary organization for the purpose of maintaining in a healthful and attractive condition, and in protecting the interests of property owners of that section of Brooklyn known as Midwood Manor, in which the property of plaintiff-in-error is situated.

Pauline R. Kalvin is the owner of a one-family house on the corner of East 10th Street and Avenue J, directly opposite to the property upon which plaintiff-in-error seeks permission to build its tenement house. In the month of September, 1922, she commenced proceedings against the plaintiff-in-error and the Superintendent of Buildings to restrain the issuance of a permit and the erection of this same tenement house, as being in violation of restrictive covenants then existing. An injunction *pendente lite* against the plaintiff-in-error was granted in her favor, the injunction expiring with the expiration of the restrictive covenants on January 1st, 1923 (*Rec.*, pp. 38-39).

Facts.

The Rosevale Realty Company, Inc., acquired title to the property above referred to between March 1st, 1922 and April 10th, 1922 (*Rec.*, p. 5). At that time there existed certain restrictive covenants which limited the area upon which relator might erect buildings, including requirements for a 20-foot to 30-foot set-back from the street lines of Avenue J and East 10th Street, requiring side yards, and imposing certain other restrictions for the purpose of aiding the development of this section as one of high class one and two-family detached houses (see deeds to relator's predecessors in title, *Rec.*, pp. 27-32, and map of Midwood Manor, opposite *Rec.*, p. 42). These covenants by their terms expired on January 1st, 1923.

In violation of these covenants the Rosevale Realty Company, Inc., on July 18, 1922, filed plans with the Tenement House Department, in the Borough of Brooklyn, for the erection of a forty family tenement house upon this plot. These plans were subsequently approved, and, on August 31, 1922, they were filed in the Bureau of Buildings of the Borough of Brooklyn (*Rec.*, pp. 5-6). On September 1st, 1922, the Superintendent of Buildings issued a temporary permit for the construction of this tenement (*Rec.*, p. 6).

Meanwhile on August 1st, 1922, the residents of Midwood Manor filed with the Board of Estimate and Apportionment a petition to place the entire east and west sides of East 10th Street between Avenue K and what is known as the Long Island Railroad Cut into an "E" area district zone, the same having theretofore been in a "C"

area district zone (*Rec.*, pp. 6-7). And on September 2nd, 1922, the Superintendent of Buildings revoked the temporary permit issued by him by reason of this petition (*Rec.*, p. 6).

As above referred to, on September 19, 1922, the Supreme Court, Kings County, issued a temporary restraining order against the construction of this tenement house (*Rec.*, p. 21), and on October 20, 1922, the Court granted an injunction *pendente lite* restraining the construction of this building until the expiration of the restrictive covenants on January 1st, 1923 (*Rec.*, pp. 38-39).

On September 22, 1922, the relator herein made an application to mandamus the Building Superintendent to issue a permit to it for the construction of the tenement house as planned. This was denied by Mr. Justice Van Siclen on October 25th, 1922; such denial was subsequently affirmed by the Appellate Division with the opinion quoted in the petition herein (*Rec.*, p. 8). See *Appendix* C, *post*.

On October 20, 1922, the Committee on City Plans and Public Improvements reported favorably to the Board of Estimate and Apportionment on the resolution to change the district above referred to from a "C" to an "E" zone following the recommendation of the Chief Engineer, and thereupon after a hearing at which plaintiff-in-error was represented by counsel, the petition of the property owners was acted upon and the Board of Estimate and Apportionment duly adopted the zone change (*Rec.*, pp. 11-13).

The Rosevale Realty Company, Inc., now comes into court and demands that a permit be issued to it on the ground that such resolution of the Board of Estimate and Apportionment was void and unconstitutional under Section 1 of the Four-

teenth Amendment to the Constitution of the United States, and under Section 6 of Article I of the Constitution of the State of New York (*Rec.*, p. 8).

No application has ever been made by the relator to the Board of Appeals for a variation of the amendment to the Building Zone Resolution pursuant to Chapter 601 of the Laws of 1917 and Section 20 of the Building Zone Law.

It was also claimed in the State Courts by plaintiff-in-error that by reason of its having filed its plans with the Superintendent of Buildings prior to the adoption of the amendment to the Building Zone Law it came within the saving clauses contained in Sections 23 and 24 thereof which relate to *existing buildings*. The Court of Appeals held, however, two Judges dissenting, that the plaintiff-in-error was not within the protection afforded by those sections (*Rec.*, p. 45; see 237 N. Y. 580).

As the Court of Appeals rendered no opinion, there is nothing to show upon what ground it decided this point. It may have reached this determination (a) because it felt that there was no *existing building* on the premises within the purview of those sections, as was held under a similar enactment by the Supreme Court of Massachusetts in *Brett* vs. *Building Commissioner of Brookline*, 145 N. E. 269; 247 Mass., or (b) because any plans filed by plaintiff-in-error and any work done or contracted for was in violation of its restrictive covenants and therefore entitled it to no relief.

See *Opinion* of Mr. Justice Faber herein (*Rec.*, p. 41).

The interpretation of Sections 23 and 24 is not before this Court. It presents no Federal ques-

tion. It is not raised by the assignment of errors herein (*Rec.*, pp. 47, 48).

This case only involves the *due process of law* clause. There can be no question with respect to the *equal protection of the laws.* For it is particularly stated on page 75 of the brief of plaintiff-in-error that "*Plaintiff-in-error cannot claim that its case is one of peculiar hardship. It is, under the provisions of the ordinance, in the same position as all other property holders in E Area District.*"

POINTS

I.

The New York Building Zone Law and the amendment thereto adopted October 20, 1922, are constitutional, and the plaintiff-in-error acquired no vested rights by violating the restrictive covenants contained in its deeds.

The widespread adoption of zoning plans in this country is shown by two Bulletins issued by the Department of Commerce, Division of Building and Housing, in March, 1925. There were 320 Municipalities throughout the United States, with a total population of more than 24,000,000, with zoning ordinances in effect on January 1st, 1925. Among the cities zoned were New York, Chicago, Boston, Pittsburgh, Los Angeles, and the City of Washington. Of the total number of zoned Municipalities, 199 have comprehensive zoning ordinances regulating use, height and area, while 121 limit zoning either to the use and height

of buildings, the use and area of buildings or to use alone. Forty-four out of the 68 cities of the United States with a population of more than 100,000 have zoning ordinances in effect, and 62 per cent. of Municipalities of over 25,000 inhabitants have adopted zoning ordinances. Of these New Jersey has approximately 70; New York, 56; California, 38; Illinois, 36; Massachusetts, 24; Ohio, 21; Wisconsin, 14; Michigan, 9; Indiana, 5; Kansas, Missouri, Pennsylvania, Rhode Island and Virginia 4 each.

Such is the importance of zoning to the urban population of the United States, that the Department of Commerce has had prepared a standard State Zoning Enabling Act which has been adopted by thirteen States.

In an able review of zoning in this country, published in the Harvard Law Review for May 1924,[1] it was stated:

> "The rapidly growing industrial city of today presents problems for legislative solution by methods which would have been inappropriate to more rural and pioneer conditions. What is the meaning of 'reasonable,' when we speak of reasonable relationship to public health? A strict, anxious adherence to the principle of separation of legislative and judicial power would result in defining reasonable to mean that the reasoning faculties of an intelligent legislator, exercised with some degree of care and honesty, could discover and credit a tangible, palpable relationship between the measure under consideration and the promotion of health. In many police power cases the courts have adhered to this super-scrupulous limitation of their function. As we all know, however, in

[1] 37 Harv. Law Rev. 836-837, by Alfred Bettman, Esq., of Cincinnati, Ohio.

actual practice in constitutional cases, 'reasonable' often signifies little more than that the court does not feel that the measure under discussion is going too far, or, in other words, that, to the mind of the court, the balance of considerations of private and public interests has been fairly maintained. A new type or mode of property regulation is not likely to sustain itself in the courts, unless it can be shown to bear some analogy to recognized and sanctioned traditional methods of regulation. Consequently, as a practical if not a strictly logical matter, some brief reference to the analogies is appropriate.

What, for example, is the relationship of zoning to the law of nuisances? The term 'nuisance' is usually applied to those developments which are offensive in the most crude and obvious way, in which cause and effect are not only quite obvious to the naked ear or nose, but are also not far apart in either space or time. A slaughter-house or foundry next door to a residence, throwing its odors or clanging noises into that residence over an intervening space of a few feet, is a nuisance. The law of nuisance, however, has precepts and a philosophy, as well as illustrations. The philosophy underlying the above illustration is nothing more or less than the old adage that a man shall not so use his property as to injure another; and the precept, that a man may not send noise or odor or other disturbing substance or vibration into or onto his neighbor's property. The law of nuisance operates by way of prevention as well as by suppression. The zoning ordinance, by segregating the industrial districts from the residential districts, aims to produce, by a process of prevention applied over the whole territory of the city throughout an extensive period of time, the segregation of the noises and odors and turmoils necessarily incident

to the operation of industry from those sections in which the homes of the people are or may appropriately be located. The mode of regulation may be new; but the purpose and the fundamental philosophy are the same. If, as is the case, one of the aims of zoning be to segregate industrial and commercial street traffic from the lighter and quieter forms of traffic, by means of the segregation of the districts in which these different types of traffic normally develop, then zoning becomes obviously a mode of prevention of noise. True, the noiseless or odorless plant is excluded along with the nuisance type. Experience demonstrates, however, that the advent of the first non-residential structure in a residential neighborhood makes it more unfair and therefore more difficult to prevent the arrival of the second, even though the second be more nearly a nuisance type than was the first; that these non-residential structures tend to locate themselves in a scattered and spotty manner, thus harming a larger territory than would be affected if they were more compactly situated; that often the neighborhood becomes blighted as a place of habitation, without substantially developing as a business or industrial district; that, consequently, the single new plant, however non-nuisance in itself, may not be inoffensive, or, at least, falls well within the settled principle of constitutional law which permits the innocuous to be included within the prohibition or regulation when such inclusion is reasonably necessary in order that the harmful may be successfully combatted."

The history of the New York Zoning Law and the economic and sociological background thereof.

The resolution of the Board of Estimate and Apportionment of the City of New York of July

25th, 1916, was adopted pursuant to the Enabling Act passed by the Legislature of the State of New York, Chapter 470 of the Laws of 1914, which was thereafter amended by Chapter 497 of the Laws of 1916 and Chapter 601 of the Laws of 1917. The Enabling Act in its present form as an amendment to the Greater New York Charter is annexed to this brief as Appendix A.

Pursuant to resolution of the Board of Estimate and Apportionment on February 27th, 1913, the Mayor appointed a Heights of Buildings Committee which in turn appointed an Advisory Committee consisting of distinguished attorneys and business men of the City of New York. This Committee in December, 1913[2], transmitted to the Board of Estimate and Apportionment a report in which it considered limitations on the heights of buildings in American and European cities, and especially the heights of buildings in the Borough of Manhattan.

After the passage of the Enabling Act, the Board of Estimate and Apportionment on May 22nd, 1914, passed a resolution for the appointment of a Commission on Building Districts and Restrictions and "That the Committee on the City Plan of the Board of Estimate and Apportionment, the chief engineer of the Board, the presidents of the various boroughs and the various city departments be requested to advise with the Commission, and to co-operate actively with it in the preparation and study of the necessary data." Again a committee of distinguished citizens was appointed, and in June, 1916, they submitted to

[2]Report of the Heights of Buildings Commission to the Committee on the Height, Size and Arrangement of Buildings of the Board of Estimate and Apportionment of the City of New York, December 23, 1913. A copy of this document is submitted herewith.

the Board of Estimate and Apportionment a report of some 280 pages considering city zoning from many angles, and incorporating maps, diagrams and photographs in support of their findings and recommendations; they also submitted a proposed plan of building zone resolution, which, with some few changes, was finally adopted on July 25th, 1916. The following passages in the latter report[3] are illustrative of the thoroughness of the Committee's investigation and of its material findings:

> "Light and air are so important that their provision should be required in every section of the city up to that point at which their benefits as to that particular section tend to be outweighed by other needs and requirements of city life. Under New York City conditions the upper limit would probably be the single detached house on a forty or fifty-foot lot with ample open spaces about it. This the proposed E district regulations would in large measure secure. At the other extreme the minimum provision of light and air assuredly should not be less than that required by the present Tenement House Law. For large areas in New York City neither of the above extremes furnishes an appropriate standard. The one and one-half and one times height districts and the C and D area districts will supply the demand and need for light and air standards between these two extremes.
>
> From the point of view of public advantage the distribution of population is very important. Most of the evils of city life come from congestion of population. In precisely the measure that the city's population can be distributed will those evils be mitigated. As the

[3]Commission on Building Districts and Restrictions—Final Report—June 2, 1916, published by the City of New York, Board of Estimate and Apportionment Committee on the City Plan 1916—pages 29,31. A copy of this document is submitted herewith.

number of families housed per 50-foot lot increases:

(1) The provision of light and air, so essential to health, vitality and comfort decreases.

(2) The opportunities for personal contact and thus for the spread of communicable disease increase.

(3) Noise and confusion incident to increased street traffic increases.

(4) Each family suffers more and more from the noises from neighboring families.

(5) Privacy is diminished.

(6) The children have less and less opportunity for outdoor play.

(7) The danger from fire, both to life and property, is increased.

(8) The transit lines becomes more and more congested during the rush hours.

It is therefore essential in the interest of the public health, safety, comfort, convenience and general welfare that a housing plan be adopted that will tend to distribute the population and secure to each section as much light, air and relief from congestion as is consistent with the housing of the entire population for a considerable period of years within the areas accessible and appropriate for housing purposes.

In order to provide the people of the city with the kinds of homes that they desire, are willing to pay for and that will bring the maximum advantage from the point of view of public health and safety, it is absolutely necessary to district the city in such a way as to encourage and conserve particular types of building in particular sections.

The control of the intensity of use of land cannot safely be left to economic forces. Unless for each section standards of height and area covered are fixed, the tendency will be to build up solidly to the extent permitted by the

Tenement House Law. The real demand for single family houses and for multi-family houses with adequate yards and open spaces will not be supplied because builders and investors have learned that such developments are in danger of being ruined by the erection of a few neighboring buildings of a different and more intensive type.

Tenants move away from the congested centers in order to secure better light and air. But if after a few years the bright, sunny building to which they have moved becomes surrounded by buildings similar in height yard and court provisions to the building in the congested center in which they were formerly located, the desirability of the new location for this class of tenants disappears and rentable values are likely to be seriously impaired. A proper districting plan will insure that wherever probable intensity of demand will permit, a certain measure of the improved light and air conditions that have attracted tenants to the new location shall be permanently retained.

Private developers in suburban residence districts have found that in order to attract purchasers it is necessary to place uniform restrictions on the land against improvement by multi-family dwellings. The surroundings and neighborhood are all-important in securing desirable home conditions. Unless the private residential character of the section is fixed for a considerable number of years no one can afford to build a home. This method of private restriction frequently fails either because the territory covered is not sufficiently inclusive or because the restriction is limited to a short term of years. In recent years the development of detached house sections has been greatly retarded by the fate of many such sections where by the coming of a few apartment houses the entire section has been destroyed for private house

purposes. Often in such sections the apartment house is a mere parasite. There would be no economic reason for its construction were it not for the open spaces and attractive surroundings created by the private dwelling character of the neighborhood."

The Committee was divided into Sub-Committees for the various Boroughs of the City of New York, and had on its staff, besides attorneys, the chief engineer and assistant engineers of the Board of Estimate and Apportionment, an investigator, and a transit expert. After its first draft of the zoning resolution it held numerous hearings at which distinguished architects, physicians, lawyers, real estate operators and business men testified concerning the need of the City for such a comprehensive zoning plan and the probable effects thereof. It is impossible to quote at length the testimony so taken. It related chiefly to circumstances of health, policing, fire hazard, traffic, transportation, and congestion of population. Among those who testified were the traffic expert of the Fifth Avenue Association, the Town Planning Advisor of the Commission of Conservation of Ottawa, Canada; Senator Calder, who is by profession a builder; the Secretary of the New York City Police Department; Officers of Insurance Companies and Property Owners' Associations; Ambassador, later Judge, Elkus; the Commissioner of the Department of Health; the Commissioner of the Department of Street Cleaning; the Tenement House Commissioner; the Secretary of the Tenement House Committee, Brooklyn Bureau of Charities; the Chief of the Fire Department; the President of the Department of Taxes and Assessments; engineers; and many others.

Some of the significant statements applying especially to area district zoning follow:

Dr. Gustave F. Boehme, Jr., Neurologist and Clinic Assistant, Manhattan State Hospital for the Insane.

"The lack of natural light in rear apartments has a bad effect on the health of tenants. First of all, I find a great many women suffering from anemia due to the fact that the apartment is not properly aerated by sunlit air. Then, because of the congestion, the noise, and the fact that the purifying influences on the air of the court is not present, we find many who suffer from marked nervous conditions. In any of the side street apartments where there are no facilities for natural light, practically every inhabitant is below par as an individual unless he takes care of himself, goes out and plays golf or tennis, and so gets away from the bad influences due to non-sunlit air."[4]

Dr. Haven Emerson, Commissioner of the Department of Health.

"The causes that take off a large percentage of the lives in a great city, particularly New York City, could be summed up in the words, opportunity for personal contact and diminished personal resistance. Congestion is a term that can be twisted variously. Diminished resistance of humans, as with vegatation, depends upon the artificiality of their environment. You cannot raise babies any more without light and air than you can raise plants, and where you cannot prove that a disease has followed congestion you can almost always show diminished resistance.

We should expect less communicable respiratory disease in detached houses than in ten-

[4] *Ibid.*, Page 95.

ements, but inasmuch as the reporting of respiratory disease is not compulsory, there is no record anywhere in this country of the incidence of respiratory diseases other than tuberculosis. We have no morbidity statistics of the City as a whole and there are no comparative figures to prove it.

It is proved that sunlight in the living room and the sleeping room materially aids in providing resistance against diseases like tuberculosis. The sun has a destructive effect upon disease breeding bacteria. Direct sunlight is a most effective disinfectant. Direct daylight—even though not direct sunlight—has a powerful influence in destroying pathogenic bacteria. In addition to that people who are able to live in well lighted apartments have a physical resistance which is superior to that of people who live in dark rooms. That has been proved under exact experimental conditions in laboratory tests and is a matter of common observation among human beings.

* * *

Excessive stair climbing and excessive standing when fatigued in crowded conveyances unduly aggravate certain disabilities from which women suffer. Climbing stairs is not *per se* any more dangerous for women than for men, but the disabilities from which they commonly suffer are apt to be aggravated more than the disabilities from which men suffer. The class of people who suffer much more than women is the large army of children with cardiac diseases, and there are 16,000 children in the public schools of this city who have now such damage to their hearts as will probably permanently handicap them.

At least two per cent of the children in the public schools have organic diseases of the heart, resulting either from infection acquired congenitally, or acquired as the result

of scarlet fever, tonsilitis, rheumatism, chorea, etc.

These children, if they live in such places as one and two family houses, for instance, or premises where they have but little stair climbing to do, are going to be able to adjust themselves and compensate for their physical defects during their early years, so as to become fit and effective self-supporting citizens; whereas, if during this period their only possibility of residence is where they have to do much stair climbing, the chances of their permanent injury is considerable.

Dust.

Probably the danger of dust is not so much in its carrying the actual germs of disease as in irritating the respiratory passages and making them more accessible to invasion. The amount of dust which people inhale makes the nose and throat more accessible to the invasion of infection when crowded in traffic conveyances immediately after coming from the street, so, with that proviso, I should say this: That where there is excessive dust or excessive draught and spreading of dust through crowds of people in the streets, there is going to be a diminished local resistance of the respiratory tract to such diseases as people are commonly exposed to in crowded premises, such as moving picture theatres, traffic conveyances, and many places of public assembly.

* * *

I should say we could anticipate with perfect certainty a diminished sick rate, a diminished incidence of infectious disease, and a diminished death rate, in all areas of the city limited to residence developments. The *portions of the city which have the small family house development show a lower death rate than prevails elsewhere in the*

city under equal economic conditions. Children who are brought up in single or two family houses, where there is plenty of land about, are more likely to be healthy than those brought up in an apartment or a tenement house."[4]

John C. Gebhart, Secretary of the Tenement House Committee, Brooklyn Bureau of Charities said:

"Advantage of uniform area provisions for all buildings.

The erection of factories adjacent to tenements to a large extent nullifies the advantages obtained from the Tenement House Law. This is especially the case where the tenement house has been built with an inner court on the lot line; a factory can come along and shut off the light that theoretically should come from the neighboring building. There are a good many cases of that kind. Besides, residence streets have been ruined, made unattractive and undesirable by the invasion of undesirable trades and industries which have no place there.

Larger courts and yards in lieu of parks.

Many one and two family house sections have large open spaces in the rear or front where the children can get recreation and fresh air. If we are going to allow these sections to be taken up by large tenements we are going to take away that feature from their lives. The relatively small park acreage of Brooklyn should be considered in this connection. In Brooklyn only 2.29 per cent of the area is given over to parks, whereas in the Bronx 15.13 per cent and in Manhattan 10.25 per cent is reserved for such use. It is necessary, therefore, to compensate for this

[4] *Ibid.*, Pages 107, 108, 109.

loss by providing larger open spaces about the houses. This we feel you have not sufficiently considered in your recommendations.

Overcrowded schools.

In some of the congested sections of Brownsville, the schools are not only overcrowded, but overcrowded to the extent of violating the Sanitary Code. Many of the rooms have a placard which says, 'legal capacity 45,' yet they probably have 60 children. This condition the Department of Education has to meet as best it can. The point is that the neighborhood is too congested for the school facilities which the city can provide. Besides, many children can go to school only half-time because of the overcrowded condition. By spreading the population over wider areas and in smaller housing units this problem would at least be partially solved."[5]

Chief Kenlon of the Fire Department stated:

"In the thirty years that I have been connected with the Fire Department, lower Manhattan has changed from a five-story to a twenty-five story city. There is great congestion there at the present time; during the day time it is difficult to move apparatus in response to fire calls in the lower end of Manhattan Island. Increased congestion of people and traffic in this section will cause very serious delays in getting apparatus to work around the scene of a fire. Even at present it is very difficult until the police reserves arrive and establish fire lines at a safe distance from the scene of the fire. The same condition prevails in the uptown section from 23rd to 45th Street, particularly at certain hours. The men who laid out the old part of the city 250 years ago had very little concep-

[5] *Ibid.*, Pages 122, 123.

tion of the conditions that obtain today. Those gentlemen could not possibly see the great 10-ton and 15-ton motor trucks running around on our streets. Downtown today it is almost impossible to get through the streets. In ten years from now horses will be a very rare sight on the streets of New York. The small buggy has been superseded by the Packard, which takes four times the space. The streets are too narrow in the lower part of Manhattan to take care of the traffic. It is a serious matter; it requires a great deal of experience, a good hand and a strong arm to drive fire apparatus through the streets of lower Manhattan. Any plan that will in a measure prevent the increase of congestion in the central portions of the city, is a plan in the right direction.

* * * * * * *

I should like to have hazardous trades, especially the storage, transportation and sale of explosive and combustible materials segregated in different parts of the city. Segregating business of a hazardous kind would lessen the fire danger; we would not get what we call a conflagration breeder stuck in among a lot of other buildings. It would also facilitate the fighting of fire.

If you can confine stores to broad avenues and good substantial buildings, and reserve side streets for residences, there would be a great deal less danger from fire.

I think you are on the right line for the health and safety of the people in establishing residential and industrial districts. I am heartily in accord with the plan of the Commission. I have seen New York grow, and grow very rapidly. Take Harlem, for instance, north of Central Park. I remember very well when there were very few houses on that great plain. At the present time it is solidly built up, and at night is one of the most congested parts of the city.

Segregating buildings according to occupancy in different sections of the City will restrict the area in which a conflagration can occur. It will be a help to the Fire Department in laying out and equipping fire houses. I think it will greatly lessen the cost of fire protection.

If we can apply to the outlying sections provisions that will prevent so great a percentage of the lot being covered by buildings, by laying out wider yards and courts, the safety of the city will be promoted. Such a plan would tend to prevent the spread of fire. Where the area of the yard is increased on both sides and the courts are larger the danger of the spread of fire is considerably less. The proposed plan requires a rear yard for every building back to back with another building. This yard must increase in width with the height of the building, being generally in Manhattan a yard of 10 feet for a five-story building and one of 20 feet for a ten-story building.

This requirement in my judgment would, in many cases, prevent the spread of fires and make it less difficult to fight fires."[6]

Lawson Purdy, President, Department of Taxes and Assessments of the City of New York, stated:

"Invasion of private house sections by apartment houses.

Tenement houses, more euphoniously called apartment houses, built to the full limit allowed by law, have intruded into a territory beautifully developed with single family dwellings at great cost, well constructed, in condition to last for a hundred years, and have destroyed their value in large measure. The first tenement house when it

[6] *Ibid.*, pages 138-139.

can freely steal its light and air is profitable. When it must depend on the light and air it furnishes for itself, on its own lot, it frequently becomes unprofitable. When a wide street is developed from end to end with buildings one hundred and fifty feet high, the buildings on the street to the rear are deprived of light and air to such a degree that they are no longer profitable as a rule and frequently must be unhealthful. The servant problem, ever with us, is complicated and rendered impossible of decent solution by the fact that in such blocks there is not one single light kitchen—not a kitchen into which a direct ray of sunlight ever enters.

Fictitious land values.

In the whole territory just described we have cases again of fictitious land values—values predicated upon the possibility of the erection of a twelve-story tenement house that steals light and air as I have shown. When that larceny is prevented profit is not there, and land values prove to have been a mirage. The pathetic instances of single family dwellings sandwiched between buildings of ninety feet and one hundred and fifty feet appeal to one who knows what sacrifice of value has resulted and what miserable conditions of human habitation exist. Any sixty-foot street that may fully be developed with nine-story apartments ninety feet high, is in my opinion unfit for human habitation, and exercises a like influence upon the adjoining parallel street. On the other hand, a street sixty feet wide, developed with six-story apartments, is a reasonably fair street. Personally, I think the height is too great, and that were it now possible, it would be infinitely better to restrict the height to once the width of the street. An angle of forty-five degrees produced by the rule of once the

width of the street is insufficient to give direct sunlight on short winter days to the lower stories. Surely, that should be the limit.

Districting a benefit to real estate.

Not only will the plans as tentatively submitted by this Commission not work any general hardship upon owners of real estate, but I shall be greatly surprised if there is any hardship anywhere of any consequence, and I am profoundly convinced that the future welfare—financially—of the owners of real estate is dependent upon the speedy enactment of restrictions as to height, area and use, at least as restrictive as those now presented by the Commission."[7]

There is also the testimony of the Deputy Engineer of Subway Construction of the Public Service Commission, First District, New York, on the relation of zoning to transportation facilities.[8]

Herbert S. Swan and George W. Tuttle of the staff of the Committee on City Plan made a remarkable survey of the relation of Height and Area Regulations to the important item of sunshine in rooms and in streets. This study is found on pages 176 to 188 of the report. These investigators state:

"Relation of height and area regulations to sunshine.

The building requirements in Manhattan have in the past been so lax that it is safe to say that a preponderating majority of rooms in the existing shops, factories, offices and apartments receive absolutely no direct sunshine on the shortest day in the year.

[7] *Ibid.* pages 169-170.
[8] *Ibid.* pages 190-194.

> The height and area regulations now being considered will have the tendency of remedying this condition. By limiting the height of buildings with reference to the street width and by requiring all windows to open out on either streets or open spaces of a prescribed size the zone plan will provide a larger supply of direct sunshine not only in the interior of all new residence and business buildings but also in the streets.
>
> The following paper shows the relation of these provisions to the duration and quantity of direct sunshine obtained under different conditions at New York City (40° North Latitude) as on December 21st.''[9]

This investigation shows in detail the effect of the bulk of neighboring buildings upon the duration of the sunshine period, the volume of sunshine entering rooms, and the illumination of the facade and rooms of buildings.

It is pointed out that the shadow cast by the Equitable Building at noon on the shortest day of the year is about one-fifth of a mile in length and completely envelops an area of 7.59 acres. The area covered by the Equitable Building itself is only 1.14 acres. This is an extreme case but it illustrates what is to be found to a lesser degree in relation to smaller buildings.

On page 179 it is pointed out that ''the amount of direct sunshine entering a window decreases far more rapidly with increased height of buildings than does the sunshine period.'' Expressed in other terms, this means that an increase in the bulk of neighboring buildings will decrease the cubic feet of interior space illuminated by the sun per hour more rapidly even than it will decrease the number of hours during which the facade of a building is illuminated.

---

[9] *Ibid.* page. 176.

As bearing especially upon the court and side yard requirements and the limitation of the bulk of buildings of various heights as contained in the "E" zone, the study appearing on pages 184 to 185 of the report is particularly valuable:

"Illumination in inner courts.

The minimum size prescribed by the Tenement House Law for an inner court on the lot line in a tenement 60 feet high is 12 feet by 24 feet. The law contemplates that this court should be complemented by a court of similar size on the adjacent lot, but it does not enforce this provision. Let us assume that the adjoining building when erected does not have its courts co-ordinated with those on the lot considered. Then if this building is also 60 feet high, our tenement, which is once the width of the street if built on a 60-foot street is served by a court only half as large as that contemplated by the law. In that event the direct illumination obtained from the sky at the bottom of the center portion of the side wall is only 2.1 foot candles while that at the center portion of the end wall is only 3.8 foot candles. The street facade, assuming the street to be uniformly improved with 60-foot buildings, receives at the bottom 128 foot candles. *In other words the direct illumination received at the bottom of the court is only from one and one-half to three per cent. of that received at the corresponding point on the front facade of the tenement.*

"Assume that the complementary court 12 feet by 24 feet is provided on the adjoining lot, making a combined court 24 feet by 24 feet, the direct illumination at the bottom of the wall would still be only 7.5 candles or 5.8 per cent. of that obtained at the bottom of the street facade.

"The direct daylight illumination obtained in an inner court the length of which is twice its width and the height of which is expressed in multiples of its width is stated in the following table. The illumination given is that received on a vertical surface at the bottom of the court wall half way between its ends.

Height in Terms of Width of Court	Illumination in Foot Candles	
	On End Wall	On Side Wall
1	103.9	109.9
2	34.3	25.9
3	14.2	9.0
4	7.0	4.0
5	3.8	2.1
6	2.3	1.2

Daylight entering windows.

"The quantity of daylight entering an ordinary front window is between 40 and 75 per cent. of that falling on the street facade. From 25 to 60 per cent. of the daylight received by the facade is cut off from penetrating into the rooms by the frame in which the window is set. This is the situation with an unobstructed window. If there are buildings on the other side of the street opposite the window the percentage of daylight received by the room is, of course, much smaller, the exact amount depending upon the height of the obstructing buildings."

George C. Whipple, Professor of Sanitary Engineering, Harvard University, in discussing the Plan said:

"Ventilation.

The necessity of adequate ventilation need not be argued, but it is not as fully realized

as it should be that the air which enters a building, both in amount and quality, is influenced by the surrounding buildings. If buildings are too close together there is likely to be a stagnation of the air between them. The ventilation of streets, alleys, courts, and interior spaces between buildings is as much a matter of public importance, as the ventilation of rooms is a matter of individual importance. Street ventilation is influenced not only by the orientation of the streets and the prevailing wind movements, but by the height, size, shape and character of buildings, and their distances apart. In cavernous streets there are excessive air currents near the ground, and at times great air movements, especially objectionable in winter. On the other hand, at times of gentle air movements there may be no currents at all near the streets and pavements between high buildings because the friction of the air passing through the narrow channels prevents them. In other words, narrow streets lined with high buildings tend to produce extreme conditions of air movement and both extremes are objectionable. *In regulating the size and height of buildings with reference to the streets the city is to a considerable extent controlling street ventilation and the ventilation of courts and interior spaces, and thus indirectly the ventilation of indoor quarters.*

Quite as important as the volume of the air taken into buildings, is its cleanliness. One of the difficulties in cities is to obtain proper air inlets for ventilation systems. The amount of smoke and dust, foul odors on the streets, bad smells from buildings, from passing vehicles, from exposed refuse and from other sources are matters properly subject to the control of the health department, but *the concentration of dust and smoke and foul odors is greatly influenced by street ventilation.* The regulation of buildings is a regu-

lation of the amount of dilution of odors, and is, therefore, a public health factor.

Vegetation.

It is becoming more and more recognized that vegetation is very desirable in residential districts for reasons of health and comfort. Vegetation cannot thrive without sunlight and it is a matter of history that the increasing height of buildings has driven out the trees from streets, while the extension of buildings over large percentages of the lot have left little chance for vegetation of any kind. Trees, shrubs, and grass tend to cool the air during hot weather. Trees produce desirable shade, and yet in winter they do not obstruct the sunlight. Trees therefore furnish a shade which is automatically adjustable, increasing when it is most needed and decreasing when objectionable. In this respect the shade of trees differs from the shade of buildings.

The effect of vegetation is local. Trees and grass concentrated in parks cannot take the place of vegetation on streets and individual house lots.

* * * * * *

Granted that indoor conditions are more important than outdoor conditions, but to a considerable extent dependent upon them, it is obvious that architects cannot design buildings so as to obtain the best interior conditions unless the exterior conditions are definitely established. Nothing in the history of housing has been more distressing than the objectionable conditions which arise from the changes which take place in entire districts. The residential section of to-day becomes the business section of tomorrow; houses are vainly altered to meet the new conditions, the results being almost always unsatisfactory. *Individual houses built to*

secure the maximum amount of light and air suddenly find their windows blanketed by high walls on adjoining property. Had this been known in advance the original building would have been constructed on different plans. It is so obvious that it need not be emphasized that the more permanent the space between buildings, the better can the architect adapt the interior to the exterior conditions. *This is in itself a sufficient justification for the regulation of the height and area of buildings, and for the imposition of different restrictions on different districts.*

Residential districts need more severe restrictions than other districts; industrial regions need less severe restrictions than business districts. It is to be granted that restrictions are needed from the standpoint of residence; it is in the interest of conservation to divide the city into different districts in order that all of the land may be fully used to its proper limit.

But the regulation of the bulk of buildings is not enough. Their use must also be regulated within limits, for the use of buildings also affects the health, morals and safety of the people. The best use cannot be made of any building unless the use which is to be made of adjoining buildings is also known. It is not possible, however, to regulate the use of buildings too minutely, and the divisions suggested by the tentative regulations proposed by the Commission offer a reasonable solution of the problem, namely, restriction of districts to residential, business or industrial uses."[10]

The chief criticism of the proposed law by this distinguished list of experts and business men was that, if anything, it was not sufficiently stringent to secure the effect desired. This was particu-

[10] *Ibid.*, pages

larly stated to be the case with respect to "C" Area Zone which was the zone in which the property of plaintiff-in-error was located prior to the amendment.

A part of the report of the Committee of the Whole of the Board of Estimate and Apportionment, rendered to the Board itself on July 18, 1916, is especially valuable as representing the considerations in the minds of the members of the Board of Estimate and Apportionment when the Building Zone Regulation was finally adopted a week later[11]:

> "To consider the proposed plan in its relation to other plans for the physical development of the city, a sub-committee was appointed, consisting of Nelson P. Lewis, Chief Engineer of the Board, the consulting engineer of each of the five boroughs, the landscape architect of the Park Department and the consultant and secretary of the Committee on the City Plan of the Board. A copy of this subcommittee's report is appended. The report states that:
>
> > 'All of the members of the committee are convinced of the great need of restrictive regulations governing the height of buildings, the uses to which they may be put and the proportion of the plots which may be occupied by them. All of them have had ample opportunity to observe the manner in which the different boroughs and the city as a whole have lately been developing, and they keenly appreciate the unfortunate results of the lack in the past of such regulations as are proposed and the need of them to insure better control of future growth. They believe that the results of such control will be:

[11] *Ibid* pages 213-215.

'To prevent undue congestion of population.

'To insure better sanitary conditions.

'To simplify the problem of traffic regulation.

'To lessen the danger and delay of movement in the city streets which is due to mixed traffic.

'To simplify the transit problems of the city.

'To prevent the over-intensive development of property contiguous to the new transit lines now being constructed.

'To render possible a more economical development of city streets through a decrease in the width of streets and roadways where the size and consequently the number of buildings are restricted.

'To insure the permanency of character of the districts when once established, and

'Finally, to make the city a more orderly and convenient place in which to live and do business.

'The committee realizes the magnitude and difficulty of the task imposed upon the Commission and is impressed by the results which have been accomplished by it within the time which has elapsed since it was created, by the thoroughness of its investigation of existing conditions and by its obvious efforts to avoid anything which would seriously affect present values. It has not attempted to correct the mistakes of the past, but to avoid the repetition of similar mistakes in the future, so that its efforts have been wholly constructive.'

"A subcommittee was also appointed to consider the administration and technical features of the proposed plan as affecting building development. This subcommittee was composed of Rudolph P. Miller, Chairman of the Board of Standards and Appeals, the building superintendents of the five boroughs, the Tenement House Commissioner, the Fire Commissioner, John P. O'Brien, Assistant Corporation Counsel, and the Consultant and Secretary of the Committee on the City Plan. A copy of this report is appended. The subcommittee states:

> 'Your subcommittee is convinced that a well considered plan of building development is essential to the health, safety and prosperity of the city. Such a plan involves both the creation of residential, business and industrial districts and the regulation of the height of buildings and the area of courts and yards differently in different parts of the city. The plan presented by the Districting Commission seems admirably adapted to secure this result. We endorse generally the following principles which are fundamental in the Commission's proposed plan:
>
> '1. *Provision for light and air is a prime essential in building regulation.*
>
> '2. *Building regulations in each section of the city should be adapted to the requirements of that section.*
>
> '3. It is desirable as a general rule to treat all buildings in a given block according to a uniform rule. There should be a substantially uniform contribution from each owner to the light and air of the block. Block ventilation is essential to well ordered development. Rear yards should be required wherever buildings come back to back.

'4. *A building is usually appropriately located when it is surrounded by buildings of similar type and use.* Order in building development is essential to the health, safety and comfort of the public, and far from depressing values or working hardship to property owners generally, will actually conserve and enhance values.

'5. The residence sections should be protected against unnecessary invasion by commercial and industrial uses.

'6. The present congested condition in lower Manhattan constitutes a serious danger to life and property. Street congestion may interfere seriously with the movement of fire apparatus. The occupants of high office and loft buildings may be endangered by fire and panic.

'These and other considerations advanced in the Commission's report prove the urgent need for the adoption of a districting plan. The official duties of the members of this subcommittee bring to their notice the irreparable injury that, almost daily, is being brought about by the erection of inappropriate buildings or the establishment of business uses in residence sections. The remedy proposed is timely and appears to have been most carefully worked out.'

"The Districting Commission is composed of men eminently qualified for the important problem given them to solve. They have brought to the accomplishment of their task experience, expert knowledge and a willingness to give of their time and energy to a degree seldom equaled in an unpaid commission of this kind. The Commission's membership includes the very highest expert knowledge in real estate matters and build-

ing construction as well as in general civic interests, including public sanitation and safety. The plan that the Commission has presented is comprehensive and thoroughgoing, while at the same time it is moderate and practical. The Commission has adhered strictly to the only purposes for which the police power may be properly exercised, *i. e.*, the public health, safety, convenience, comfort and general welfare."

Summary of the Zoning Resolution.

At the same time that this resolution was adopted by the Board of Estimate and Apportionment, and in conjunction therewith, the Board approved three maps of the entire City of New York. One mapped the city into use districts, a second zoned it into height districts, and a third divided it into bulk or area districts.

The use districts are of three varieties: Residence, Business and Unrestricted. Localities near waterways, railroads, switch connections and existing industries, stables and breweries were placed in unrestricted districts and sufficient areas thus designated to provide for future industry. Streets already largely dedicated to business, lands fronting on trolley car streets and traffic thoroughfares were allocated to business uses. Business streets were provided within a reasonable walking distance of every residential plot or area. With the exception of two unmapped parts of the city (Jamaica Bay and part of Staten Island), the remainder of the city was dedicated to residential uses.

Height districts vary between 2½ times the street width in the lower part of Manhattan to 1 time the street width in residential sections.

Heights may be increased in proportion to set back, thus insuring a necessary minimum of light and air in the streets upon which high buildings front.

There are six area districts provided for, the A zone allowing a density of building bulk of 100% of the lot and the F zone permitting only 25% of the lot to be covered by buildings. It is to be noted that as in the height district map so also the more lenient area district regulations obtain in unrestricted and business districts, and the stricter limitations apply to residential areas.

The resolution is not retroactive, and consequently buildings and uses in existence prior to July 25, 1916 were not affected by the resolution. The resolution does apply to modifications of pre-existing buildings or uses.

The Board of Estimate and Apportionment is authorized to amend the zoning resolution and maps. For the first four years most of the amendments to the maps relaxed the requirements. This was quite natural during the period of adjustment to the new zoning law. It was far-reaching legislation, requiring elasticity upon its initial application; and it is a tribute to the soundness and excellence of this legislation that no court has thus far held it to be unconstitutional or unreasonable or subject to criticism, although its provisions have been in effect for almost nine years.

Since 1920 the strengthening changes to the resolution have surpassed the lessening changes, and in 1922 and 1923 the strengthening changes amounted to 77% of the map amendments.

The machinery by which amendments are made will be hereafter discussed.

As was well said by Mr. Justice Giegerich, in *Matter of Palmer* vs. *Mann*, 120 Misc., 396 (reversed on other grounds, 206 App. Div., 484):

> "The board is not required when making changes or amendments to cover the whole field of what has been said on the subject of zoning by the various commissions which framed the original legislation, or to prepare a voluminous preamble to every amending resolution, reciting the fire hazards and dangers to the public health and welfare, as outlined by experts in fire and health matters, when the original resolution was adopted. These are matters of which the officials are presumed to have knowledge and to have acted upon in the exercise of their judgment and discretion, with which the courts are reluctant to interfere. (*People* vs. *Charles Schweinler Press*, 214 N. Y., 395; *Lincoln Trust Co.* vs. *William Building Corp'n*, 229 id., 313.)"

The Board of Appeals.

In the application of a resolution as fundamental as this one, and in the applications of the numerous amendments thereto, it was anticipated that there might be difficulties or unnecessary hardships in carrying out the strict letter thereof. And so provision was made for a board of appeals to meet this situation (see Appendix §718-d). See quotation from opinion of Hogan, J., in *People ex rel. Sheldon* v. *Board of Appeals*, 234 N. Y. 484, *post*, p. 46. Where a plot is situated in two adjoining districts, where an existing neighboring use nullifies the purpose of a contemplated use of a particular lot, where the nature of the terrain or the grade or angle of a street render height, bulk or use restrictions

unfeasible, where a residential district requires the presence of a public utility and in like circumstances, the board of appeals is empowered to vary the resolution.[12]

The Board of Appeals has sometimes been referred to as the "safety valve" of zoning. This feature of the Board has been described in the following language[13]:

> "These ordinances usually contain the creation and designation of the powers of a board of zoning appeals or adjustment. This board is given power to hear and decide appeals from the rulings of the building commissioner. Its functions are mainly interpretative and administrative, though upon a very strict definition of administrative, some of the powers of the board might be considered as shading off into the legislative field. The territory of a city, particularly a large city, contains such localized topographical and developmental variations, that the map and regulations, if literally applied everywhere, would inevitably produce here and there excessive, even prohibitive, burdens. For instance, the topography of an individual lot may be such that a strict application of the bulk regulations would make it impossible to build at all. Border-line cases may need adjustment in the interest of avoidance of exceptional and excessive hardships, as in the case of an industrial plant on the border-line of a residential district, where an extension of the plant would be impossible unless some variation from the strict application of the regulations at that single point were to be permitted. The Board is generally given the power to treat these exceptional situa-

[12] See § 7. Use District Exceptions.
§ 9. Height District Exceptions.
§18. Area District Exceptions.

[13] 37 *Harvard Law Review*, Pages 853, 854.

> tions, and is an ingenious device whereby these situations can receive fair and adequate treatment without breaking down the whole plan."

It is provided by Section 20, Article V, of the Building Zone Law that

> "Where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of the provisions of this resolution the Board of Appeals shall have power in a specific case to vary such provision in harmony with its general purpose and intent, so that the public health, safety and general welfare may be secured and substantial justice done. * * * Before taking any action authorized in this section the Board of Appeals shall give public notice and hearing."

Whether the granting of discretionary power to vary the terms of the zoning resolution lies within the power of the State or Municipal legislative body, does not present a Federal question.

Welch vs. *Swasey*, 214 U. S. 91.

In any event it is constitutional to delegate such discretionary power to a body such as the Board of Appeals, and this grant of authority does not deprive any property owner of the equal protection of the laws. Similar instances of this kind have been sustained by this Court in:

Fisher vs. *St. Louis*, 194 U. S. 361.
Gundling vs. *Chicago*, 177 U. S. 183, 186.
Wilson vs. *Eureka City*, 173 U. S. 32.
Jacobson vs. *Massachusetts*, 197 U. S. 11.
Mutual Film Corp. vs. *Ohio Industrial Comm.*, 236 U. S. 230.

In the last cited case, involving the constitutionality of an Ohio statute providing for the censorship of moving picture films, MR. JUSTICE MCKENNA said at page 245:

> "The objection to the statute is that it furnishes no standard of what is educational, moral amusing or harmless, and hence leaves decision to arbitrary judgment, whim and caprice; or, aside from those extremes, leaving it to the different views which might be entertained of the effect of the pictures, permitting the 'personal equation' to enter, resulting 'in unjust discrimination against some propagandist film,' while others might be approved without question. But the statute by its provisions guards against such variant judgments, and its terms, like other general terms, get precision from the sense and experience of men and become certain and useful guides in reasoning and conduct. The exact specification of the instances of their application would be as impossible as the attempt would be futile. Upon such sense and experience, therefore, the law properly relies. This has many analogies and direct examples in cases, and we may cite Gundling v. Chicago, 177 U. S. 183; Red 'C' Oil Manufacturing Co. v. North Carolina, 222 U. S. 380; Bridge Co. v. United States, 216 U. S. 177; Butterfield v. Stranahan, 192 U. S. 470. See also Waters-Pierce Oil Co. v. Texas, 212 U. S. 86. If this were not so, the many administrative agencies created by the state and National governments would be denuded of their utility and government in some of its most important exercises becomes impossible."

In *Wilson* vs. *Eureka City, supra*, an ordinance was held to be constitutional which delegated to the Mayor of the City discretionary power to permit the moving of buildings through the streets

of the city. Obviously if such permit were refused the owner of a building might be deprived of valuable property rights.

The case of *Fisher* vs. *St. Louis, supra,* involved the constitutionality of an ordinance of the City of St. Louis prohibiting the erection of any dairy or cow-stable within the city limits without a grant of permission from the Municipal Assembly. The ordinance was attacked on the ground that the Municipal Assembly was vested with power to permit the erection of a dairy and cow-stables in some cases and to refuse the permission in others, which was a discrimination, and deprived the disfavored persons of the equal protection of the laws. Mr. Justice Brown, speaking for this Court, said at pages 371, 372:

> "We do not regard the fact that permission to keep cattle may be granted by the municipal assembly as impairing in any degree the validity of the ordinance, or as denying to the disfavored dairy keepers the equal protection of the laws. Such discrimination might well be made where one person desired to keep two cows and another fifty; where one desired to establish a stable in the heart of the city and another in the suburbs; or, where one was known to keep his stable in a filthy condition and another had established a reputation for good order and cleanliness. Such distinctions are constantly made the basis for licensing one person to sell intoxicating liquors and denying it to others. The question in each case is whether the establishing of a dairy and cow stable is likely, in the hands of the applicant, to be a nuisance or not to the neighborhood, and to imperil or conduce to the health of its customers. As the dispensing power must be vested in some one, it is not easy to see why it may not properly be delegated to the municipal assembly which enacted the ordinance. Of course, cases may

be imagined where the power to issue permits may be abused and the permission accorded to social or political favorites and denied to others, who for reasons totally disconnected with the merits of the case are distasteful to the licensing power. No such complaint, however, is made to the practical application of the law in this case, and we are led to infer that none such exists. We have no criticism to make of the principle of granting a license to one and denying it to another, and are bound to assume that the discrimination is made in the interest of the public, and upon conditions applying to the health and comfort of the neighborhood. *Crowley* v. *Christensen*, 137 U. S. 86; *Davis* v. *Massachusetts*, 167 U. S. 43; *Soon Hing* v. *Crowley*, 113 U. S. 703, 710.

The only alternative to the allowance of such exceptions would be to make the application of the ordinance universal. This would operate with great hardship upon persons who desire to establish dairies and cow stables in the outskirts of the city, as well as inconvenience to the inhabitants, who to that extent would be limited in their supply of milk. **It would be exceedingly difficult to make exceptions in the ordinance itself without doing injustice in individual cases, and we see no difficulty in vesting in some body of men, presumed to be acquainted with the business and its conditions, the power to grant permits in special cases."**

A familiar instance of the constitutional grant of power to a Board to make distinctions in the treatment of such persons who may be affected by a statute is that which is reposed in the ordinary Board of Assessments.

Campbell vs. *City of Olney*, 262 U. S. 352.
Valley Farms Co. vs. *Westchester*, 261 U. S. 155.
Butters vs. *Oakland*, 263 U. S. 162.
House vs. *Road Imp. Dist.*, 266 U. S. 175, 177.

And see:

Buttfield vs. *Stranahan*, 192 U. S. 470;
Union Bridge Co. vs. *United States*, 204 U. S. 365;
Philadelphia Co. vs. *Stimson*, 223 U. S. 605, 635-638.

Interpretation of Building Zone Laws applied by the New York Courts."

The Court of Appeals has held that the Building Zone Resolution is a valid exercise of the police power and is therefore not an encumbrance upon the real property affected thereby. *Lincoln Trust Co.* vs. *Williams Building Corpn.*, 229 N. Y. 313. Nor does it make property unmarketable. *Biggs* vs. *Steinway & Sons*, 229 N. Y. 320. However, where it appears that it was understood by the contracting parties that the particular property was to be used for a specific purpose which, prior to the closing of title and subsequent to the drawing of the contract, was made illegal by the Building Zone Resolution, the courts will

"Section 19 of the Building Zone Law, which lays down the rules for interpreting the same, provides:

"Sec. 19. *Interpretation; purpose.*—In interpreting and applying the provisions of this resolution, they shall be held to be the minimum requirements adopted for the promotion of the public health, safety, comfort, convenience and general welfare. It is not intended by this resolution to repeal, abrogate, annul or in any way to impair or interfere with any existing provision of law or ordinance or any rules, regulations or permits previously adopted or issued or which shall be adopted or issued pursuant to law relating to the use of buildings or premises; nor is it intended by this resolution to interfere with or abrogate or annul any easements, covenants or other agreements between parties; provided, however, that where this resolution imposes a greater restriction upon the use of buildings or premises or upon the height of buildings or requires larger yards, courts or other open spaces than are imposed or required by such existing provision of law or ordinance or by such rules, regulations or permits or by such easements, covenants or agreements, the provisions of this resolution shall control."

not direct specific performance. *Anderson* vs. *Steinway & Sons*, 221 N. Y. 639.

In sustaining the constitutionality of this legislation in *Lincoln Trust Company* vs. *Williams Building Corporation, supra*, JUDGE MCLAUGHLIN said at page 317:

> "In a great metropolis like New York, in which the public health, welfare, convenience and common good are to be considered, I am of the opinion that the resolution was not an incumbrance, since it was a proper exercise of the police power. The exercise of such power, within constitutional limitations, depends largely upon the discretion and good judgment of the municipal authorities, with which the courts are reluctant to interfere. The conduct of an individual and the use of his property may be regulated. (*Village of Carthage* vs. *Frederick*, 122 N. Y., 268; *People* vs. *Gillson*, 109 N. Y., 389; *Matter of Jacobs*, 98 N. Y., 98). In the exercise of the police power the uses in a municipality to which property may be put have been limited and also prohibited. Thus, the manufacture of bricks (*Hadacheck* vs. *City of Los Angeles*, 239 U. S., 394); the maintenance of a livery stable (*Reinman* vs. *City of Little Rock*, 237 U. S., 171); a dairy (*Fischer* vs. *St. Louis*, 194 U. S., 361); a public laundry (*Soon Hing* vs. *Crowley*, 113 U. S., 703); regulating billboards (*Cusack Co.* vs. *City of Chicago*, 242 U. S., 526); a garage (*Matter of McIntosh* vs. *Johnson*, 211 N. Y., 265); the installation of sinks and water closets in tenement houses (*Tenement House Dept. of N. Y. City* vs. *Moeschen*, 179 N. Y., 325; affd. 203 U. S., 583); the exclusion of certain business (*Grumbach* vs. *Lelande*, 154 Cal., 679); a hay barn, wood yard or laundry (*Ex parte Quong Wo*, 161 Cl., 220); a stone crusher, machine shop or carpet beating establishment (*Matter*

of Montgomery, 163 Cal., 457); the slaughter of animals (*Cronin* vs. *People*, 82 N. Y., 318); the disposition of garbage (*City of Rochester* vs. *Gutberlett*, 211 N. Y., 309); registration of plumbers (*People ex rel. Nechamcus* vs. *Warden City Prison*, 144 N. Y., 529); prohibiting the erection of billboard exceeding a certain height (*City of Rochester* vs. *West*, 154 N. Y., 510; *Cusack Co.* vs. *City of Chicago*, 242 U. S., 526); regulating the height of buildings (*Welch* vs. *Swasey*, 214 U. S., 91); compelling a street surface railroad corporation to change the location of its tracks (*People ex rel. City of Olean* vs. *W. N. Y. & Pa. Traction Co.*, 214 N. Y., 526); prohibiting the discharge of smoke (*City of Rochester* vs. *Macauley-Fien Milling Co.*, 199 N. Y., 207); the storing of oil (*Union Oil Co.* vs. *City of Portland*, 198 Fed. Rep., 441; *Standard Oil Co.* vs. *City of Danville*, 199 Ill., 50); and generally, any business, as well as the height and kind of building, may be regulated by a municipality under power conferred upon it by the legislature (*Hauser* vs. *No. British & M. Ins. Co.*, 206 N. Y., 455).

"The resolution in question simply regulates the use of property in the districts affected. It does not discriminate between owners."

The courts have also held that the application of the Building Zone Law is like the falling of an axe. Thus, where a zoning resolution was adopted after plans for the erection of a building had been prepared and while an application for a permit to construct the building was still pending, the resolution will be sustained and enforced although it makes the plans as drafted illegal. *Matter of Cherry* v. *Isbister*, 234 N. Y. 607; and see *Spector* vs. *Building Inspector of Milton*, 145 N. E. 265; 247 Mass.

And where a permit has been obtained to construct buildings in violation of restrictive covenants and the construction has been enjoined, and prior to the expiration of the restrictive covenants the contemplated structure is made illegal by an amendment to the Building Zone Resolution, the permit is invalidated. *Cohen* vs. *Rosevale Realty Co., Inc.*, 120 Misc. 416; *affirmed* 206 App. Div. 681; 121 Misc. 618; *affirmed* App. Div.

However, under Section 24 of the New York City Building Zone Law, buildings and structures existing at the time of the adoption of the law were excepted from the application of the same, and Section 23 gives a similar protection to buildings and structures existing at the time of any amendments to the Building Zone Law. That the sections just cited do not apply in the instant case, has been held by the Court of Appeals herein, two judges dissenting, 237 N. Y. 580. Similarly it was held in *Brett* vs. *Building Commissioner of Brookline*, 145 N. E. 269; 247 Mass., that excavations, engineering work and the construction of forms do not amount to "existing structures" so as to be free from the operation of a building zone law subsequently adopted.

The New York courts will not sustain every building zone resolution. Thus, where the ordinance exceeds the powers granted by the Enabling Act it will be set aside. *City of Utica* vs. *Hanna*, 202 App. Div. 612; *Matter of Barker* vs. *Switzer*, 209 App. Div. 151; and where the sole purpose of the resolution is to perpetuate a vista on a street that has become an important commercial thoroughfare, and is adopted solely for aesthetic purposes, the same will be set aside. *Matter of Isenbarth* vs. *Barnett*, 206 App. Div. 546; *affirmed* 237 N. Y. 617.

The Board of Appeals, sometimes referred to as the "safety valve" of the Zoning Law, is given broad powers to vary the application thereof, and these powers have been uniformly supported by the New York courts. Thus, in *People ex rel. Sheldon* vs. *Board of Appeals*, 234 N. Y. 484, the Board was held to be authorized, where a plot was partly in one zone and partly in another, to vary the application of the Building Zone Resolution so as to permit the use of the plot in a uniform manner. In that case JUDGE HOGAN, speaking for the Court, said at pages 492, 493:

> "The enumerated laws embodied the first comprehensive scheme relating to the division of the city of New York into districts and the class and character of the buildings to be permitted to be erected in such districts. In 1914 when the first statute was enacted the population of the city was upwards of five millions, the territory embraced within the boundaries of the city was three hundred ninety-five square miles; the city was rapidly increasing in population and commercial activity and one would needs be optimistic to conclude that the board of estimate and apportionment in the labor assigned to it could avoid unreasonable discrimination.
>
> A review of the several laws enacted clearly indicates that the legislature appreciated the far-reaching effect of any law bearing upon the subject of a division of the city into zone districts as affecting the constitutional rights of citizens in the use of their property and so far as possible with a view of protecting such rights concluded that the delegation of power to be conferred by it upon the board of estimate and apportionment, to adopt regulations for the use to which property might be adapted, should be limited to the adoption of regulations designed to promote public health,

> safety and general welfare, the conservation of property values, the suitability of each district for particular uses and the enhancement of the value of the land throughout the city. In 1917, early following the adoption of the zone resolution, the legislature again emphasized the purpose and intent of the statute, when by chapter 601, Laws of 1917, it authorized the board of estimate and apportionment to provide in the regulations adopted by it that the board of appeals may determine and vary the application of the regulations made by the board of estimate and apportionment in harmony with their general purposes, so clearly defined in the preceding statutes."

The Board of Appeals has power to permit a stable to be built in a district where others already exist. *People ex rel. Beinert* vs. *Miller,* 188 App. Div. 113. And to permit a public garage to be constructed in a district restricted to business uses where other industrial uses already exist. *People ex rel. Parry* vs. *Walsh,* 121 Misc. 631; *affirmed* 209 App. Div. 889. Thus, also, the Board of Appeals has power to permit the conversion of an existing stable into a garage and the extension of the same. *People ex rel. Facey* vs. *Leo,* 230 N. Y. 602. And to permit the omission of a rear yard in a "B" Area District under proper conditions. *People ex rel. Helvetia Realty Co.* vs. *Leo,* 231 N. Y. 619. The discretionary power granted to the Board of Appeals in the cases just cited is similar to that granted to the Board of Appeals, established under the Labor Law, which is authorized to vary the application of that law "when there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of the law." *People ex rel. Cockroft* vs. *Miller,* 187 App. Div. 705.

Where the Board of Appeals exceeds its authority, refuses to act under the statute, or is guilty of a clear abuse of discretion, the injured party may appeal to the courts by applying for an order of certiorari.

People ex rel. Parry vs. *Walsh*, 121 Misc. 631; *affirmed* 209 App. Div. 889;
People ex rel. Healy vs. *Leo*, 194 App. Div. 973;
People ex rel. Wohl vs. *Leo*, 109 Misc. 448; *affirmed* 192 N. Y. Supp. 945;
Compare People ex rel. McAvoy vs. *Leo*, 109 Misc. 255.

Antecedents of Zoning Law Constitutionality in New York.

Many of the problems incident to the enforcement of the building zone laws have been passed upon by the New York courts in connection with other statutes, and all of the arguments against the constitutionality of the building zone laws here urged have been considered by the New York courts in those cases.

As early as 1888, in *People ex rel. Kemp* vs. *D'Oench*, 111 N. Y. 359, the Court of Appeals sustained the statute of 1885 which restricted the height of dwellings for more than one family in the City of New York to 80 feet upon streets and avenues exceeding 60 feet in width. In that case the Court said by JUDGE EARL at pages 361, 362:

> "As simple, private dwelling-houses are rarely, if ever, built eighty feet high, the main purpose of the act must have been to regulate the height of tenement and apartment houses, which are becoming very numerous in New

> York, which are usually built in the midst of dwelling-houses and in which several families live and carry on all the operations of housekeeping."

In *Health Department* vs. *Rector*, 145 N. Y. 32, the law of 1887, requiring proper construction and ventilation of tenement houses and the supplying of water on each floor of tenement houses at the discretionary direction of the Board of Health, was sustained, even where the orders of the Board of Health required the owner of the tenement house to expend money in putting in new piping. In this case JUDGE PECKHAM on page 44:

> "Any one in a crowded city who desires to erect a building is subject at every turn almost to the exactions of the law in regard to provisions for health, for safety from fire and for other purposes. He is not permitted to build of certain materials within certain districts because though the materials may be inexpensive they are inflammable, and he must build in a certain manner. Theatres and hotels are to be built in accordance with plans to be inspected and approved by the agents of the city; other public buildings also; and private dwellings within certain districts are subject to the same supervision, and in carrying out all these various acts the owner is subjected to an expense much greater than would have been necessary to have completed his building if not compelled to complete it in the manner, of the materials and under the circumstances prescribed by various acts of the legislature. And yet he has never had a hearing in any one of these cases, nor does he receive any compensation for the increased expense of his building, rendered necessary in order to comply with the police regulations."

So also, in *Tenement House* vs. *Moeschen*, 179 N. Y. 325, *affirmed* 203 U. S. 583, it was held that the statute of 1901, requiring the removal of privies, to be replaced by individual water-closets in all tenement houses, was constitutional; it was also held that the fact that the operation of the law was restricted to cities of the first class was not in contravention of the Constitution of the United States. In that case it appeared that defendant's equity in the property affected amounted to no more than $3,000. and that the cost of installing the water closets required by the law would be almost $1,900. Furthermore, only a few years prior to the adoption of the statute therein challenged, a prior statute had required the owner to install school sinks to replace the older privies. This expense had been incurred. Nevertheless it was held that under the police power the owner of the property might be required to replace the school sinks by a more modern form of construction. This case was cited with approval in *Levy Leasing Co.* vs. *Siegel*, 258 U. S. 242, 247.

In *Matter of McIntosh* vs. *Johnson*, 211 N. Y. 265, an ordinance prohibiting the construction of garages within 50 feet of schools was upheld and a permit for the maintenance of such garage was denied although there had been a garage existing on the premises for which the permit was sought prior to the adoption of the ordinance.

In *Village of Carthage* vs. *Frederick*, 122 N. Y. 268, the Court of Appeals, in sustaining an ordinance requiring the clearing of snow, ice, dirt and other obstructions from sidewalks, said by JUDGE VANN at page 273:

> "As early as 1785, by the charter of the city of Hudson, the right to legislate in regard to the 'police' power was expressly conferred.

(Laws of 1785, chap. 83, Sec. 11.) This power was then well known to the common law, and, twenty years before, had been defined by Blackstone as 'the due regulation and domestic order of the Kingdom, whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood and good manners and to be decent, industrious and inoffensive in their respective stations.' (4 Black. Comm. 162.) Municipal corporations have exercised this power, *eo nomine*, for time out of mind by making regulations to preserve order, to promote freedom of communication and to facilitate the transaction of business in crowded communities. Compensation has never been a condition of its exercise, even when attended with inconvenience or pecuniary loss, as each member of a community is presumed to be benefited by that which promotes the general welfare.''

In *People* vs. *Havnor*, 149 N. Y. 195; 43 N. E. 541, it was held that a statute prohibiting barbers from carrying on their business on Sunday was within the police powers of the legislature and was not discriminatory in that it permitted barbers in the City of New York and the Village of Saratoga Springs to carry on their business until one o'clock Sunday afternoon.

See also *People ex rel. Publicity Leasing Co.* vs. *Ludwig*, 172 App. Div. 71; affirmed 218 N. Y. 540.

An able reveiw of the early New York authorities is to be found in the opinion of Mr. Justice Jenks, speaking for the Appellate Division, Second Department, in *City of New York* vs. *Herdje*, 68 App. Div. 370, which involved the constitution-

ality of the Tenement House Laws of 1901. The learned Justice said at pages 373, 374:

> "The learned counsel for the appellant contends that inasmuch as a permit had been granted in accordance with laws actually in force, and the defendant testifies that on the morning of April 12, 1901, he had made a contract with one Doenecke to build upon the land, his inchoate right to build became an absolute property right, and that the law passed destroyed this right, impaired the obligation of the contract and is, therefore, unconstitutional. The answer to this is that the legislation in question is an exercise of the police power. In *Matter of Application of Paul* (94 N. Y. 497) the court, per FINCH, J., said that tenement houses, as a known and distinct class, are recognized and defined by law, that they are apt to be ill-ventilated, unclean and packed full of inmates, and to become centers or radiating points of contagious disease, and that as such they might be the proper subjects of sanitary regulation in the interests of the public health. In *Matter of Application of Jacobs* (98 N. Y. 112), the court, in discussing the question up, say, per EARL, J., 'We will now once more recur to the law under consideration. It does not deal with tenement houses as such; it does not regulate the number of persons who may live in any one of them, or be crowded into one room, *nor does it deal with the mode of their construction for the purpose of securing the health and safety of their occupants or of the public generally.' This is significant as a statement of what would be a fair exercise of the police power.* In *People ex rel. Kemp* v. *D'Oench* (111 N. Y. 359) the court said that it had no doubt of the competency of the Legislature, in the exercise of the police power, to pass an act regulating the height of all dwelling houses and of all houses used

or intended to be used as dwellings for more than one family. (See, too, *Health Department* v. *Rector*, 145 N. Y. 32.) In *People* v. *Havnor* (149 N. Y. 195, 199) VANN, J., speaking for the court, says: 'The sanction for these apparent trespasses upon private rights is found in the principle that every man's liberty and property is, to some extent, subject to the general welfare, as each person's interest is presumed to be promoted by that which promotes the interest of all. Dependent upon this principle is the great police power, so universally recognized, but so difficult to define, which guards the health, the welfare and the safety of the public.' I think that such legislation was in the exercise of the police power in the interest of the public health, morals and safety, as involved in the use of property for which the owners exact compensation, and that, therefore, neither the fact that the defendant had received a permit nor that he had made a contract for the construction of the building relieved him from this exercise of an act of sovereignty. (*Buffalo East Side R. R. Co.* v. *B. S. R. R. Co.*, 111 N. Y. 132, 133, and cases cited; *People ex rel. New York Elec. Lines Co.* v. *Squire*, 107 id. 605; *Health Department* v. *Rector*, *supra.*)"

And again at page 375:

"There is a finding that the defendant had not actually commenced work before the passage of chapter 334 of the Laws of 1901, and that, therefore, he was not within the exception of section 4, as originally enacted. True, he might have brought himself within the section as amended, if that section provided that his plans might have been filed on or before April twelfth. His complaint then, really, is not that the amendment deprived him of any rights assured by section 4 as

amended, but that the exception assured by the amendment is not broad enough to include him. I fail to see anything unreasonable in the action of the Legislature fixing April tenth instead of April twelfth as a day up to which the filing of plans followed by work might save the owner from the full purview of the new law. The filing of plans is, of course, the preliminary step in construction, and yet the Legislature has brought the very initiation of construction to within two days of the enactment of the law, so as to save those who have taken but this initiative step."

It is appropriate here to quote also from the opinion of Judge Hiscock in *People* vs. *Charles Schweinler Press*, 214 N. Y., 395, 406:

"In considering legislation adopted for such a purpose we must start out with the presumption that it is constitutional and valid (*People ex rel. Kemmler* vs. *Durston*, 119 N. Y., 569, 577). If the statute upon its face appears to be reasonable and just and appropriate, and we can fairly believe that its natural consequences will be in the direction of betterment of public health and welfare, and, therefore, that it is one which the state for its protection and advantage may enact and enforce, it will be the duty of the courts to pronounce it constitutional even though they should doubt its wisdom (*People* vs. *Klink Packing Co.*, 214 N. Y., 121; *Holden* vs. *Hardy*, 169 U. S., 366, 395). Or, to state the rule in converse form, before we can pronounce such a statute as that now before us unconstitutional we must be able to see either that there is no real, substantial evil of public interest to be guarded against or that there is no reasonable relation between the evil and the purported cure or prevention offered by the statute (*Booth* vs. *Illinois*, 184 U. S., 425; *Chicago, B. & Q. R. R. Co.* vs. *McGuire*, 219 U. S., 549).

"It is not a basis for a constitutional objection to a statute like this generally prohibiting the labor of women between certain hours that in exceptional cases it may prevent employment of some women for a short time between those hours under such conditions as would be productive of no substantial harm. A legislature must legislate in general terms, and its mandates are not constitutionally vulnerable because having power to act concerning a certain subject and to legislate in terms reasonably calculated to accomplish the general purpose within the scope of its authority, it covers and prohibits some isolated transaction which by itself would be harmless and unobjectionable (*Purity Extract & Tonic Co.* vs. *Lynch*, 226 U. S., 192; *People ex rel. Hill* vs. *Hesterberg*, 184 N. Y., 126, 131; *Otis* vs. *Parker*, 187 U. S., 606).

"Neither is it an effective objection to a statute if some of those who will be protected by its provisions oppose such protection, for the state has such an interest in the welfare of its citizens that it may if necessary protect them against even their own indifference, error or recklessness (*Holden* vs. *Hardy*, 169 U. S., 366; *Hennington* vs. *Georgia*, 163 U. S., 299). Nor if some cases which might have been included are omitted, for police legislation may rest on narrow distinctions (*Keokee Cons. Coke Co.* vs. *Taylor*, 234 U. S., 224; *German Alliance Ins. Co.* vs. *Kansas*, 233 U. S., 389)."

Analogous Principles Enunciated by this Court.

The only instance of genuine zoning which has reached this Court is the case of *Welch* v. *Swasey*, 214 U. S. 91. This involved an act of Massachusetts limiting the heights of buildings in the City of Boston and prescribing different heights in different sections of the city. The Supreme

Court of Massachusetts held that the discrimination was based upon reasonable grounds, and was a proper exercise of the police power of the State. This Court held that the act was a proper exercise of the police power and that it did not contravene the Equal Protection and Due Process Clauses of the Fourteenth Amendment. The following quotations from the opinion of MR. JUSTICE PECKHAM, speaking for this Court, are particularly pertinent here:

> "We do not understand that the plaintiff in error makes the objection of illegality arising from an alleged delegation of legislative power to the commissions provided for by the statutes. At all events, it does not raise a Federal question. The state court held that kind of legislation to be valid under the state constitution and this court will follow its determination upon that question.
>
> * * *
>
> In passing upon questions of this character as to the validity and reasonableness of a discrimination or classification in relation to limitations as to height of buildings in a large city, the matter of locality assumes an important aspect. The particular circumstances prevailing at the place or in the State where the law is to become operative; whether the statute is really adapted, regard being had to all the different and material facts, to bring about the results desired from its passage; whether it is well calculated to promote the general and public welfare, are all matters which the state court is familiar with, but a like familiarity cannot be ascribed to this court, assuming judicial notice may be taken of what is or ought to be generally known. For such reason this court, in cases of this kind, feels the greatest reluctance in interfering with the well-considered judgments of the courts of a State whose people

are to be affected by the operation of the law. The highest court of the State in which statutes of the kind under consideration are passed is more familiar with the particular causes which led to their passage (although they may be of a public nature) and with the general situation surrounding the subject-matter of the legislation than this court can possibly be.

* * *

In relation to the discrimination or classification made between the commercial and the residential portion of the city, the state court holds in this case that there is reasonable ground therefor, in the very great value of the land and the demand for space in those parts of Boston where a greater number of buildings are used for the purposes of business or commercially than where the buildings are situated in the residential portion of the city, and where no such reasons exist for high buildings.

* * *

We are not prepared to hold that this limitation of eighty to one hundred feet, while in fact a discrimination or classification, is so unreasonable that it deprives the owner of the property of its profitable use without justification, and that he is therefore entitled under the Constitution to compensation for such invasion of his rights. The discrimination thus made is, as we think, reasonable, and is justified by the police power.

* * *

That in addition to these sufficient facts, considerations of an aesthetic nature also entered into the reasons for their passage, would not invalidate them. Under these circumstances there is no unreasonable interference with the rights of property of the plaintiff in error, nor do the statutes deprive him of the equal protection of the laws."

The case of *Eubank* vs. *Richmond*, 226 U. S. 137, reversing the Supreme Court of Virginia, and sometimes referred to as a case involving zoning, is not properly such a case at all. It affords an excellent example of the kind of building restriction which will and should be held to be confiscatory and is in marked contrast to the New York City Building Zone Resolution.

As was expressly stated by Mr. Justice McKenna at page 144:

> "We need not consider the power of a city to establish a building line or regulate the structure or height of buildings. The cases which are cited are not apposite to the present case. The ordinances or statutes which were passed on had more general foundation and a more general purpose, whether exercises of the police power or that of eminent domain. Nor need we consider the cases which distinguish between the esthetic and the material effect of regulations the consideration of which occupies some space in the argument and in the reasoning of the cases."

The question which the Court had before it in the *Eubank* case was merely this: Was an ordinance constitutional which required a committee on streets of the City of Richmond to establish a building line not less than five feet nor more than thirty feet from the street line, whenever a request for the fixing of such line, should be made in writing by two-thirds of the abutting property owners? It requires no close study to perceive that under that ordinance the minority property owners were not accorded due process of law.

The mere fact that two-thirds of the owners demanded the fixing of such a line, made the establishment thereof mandatory, the committee

having merely discretion to determine whether the line should be somewhere between five and thirty feet from the street line.

The case was so distinguished by this Court in *Cusack Co.* vs. *City of Chicago*, 242 U. S. 526, 531.

In contradistinction to the *Eubank* case and to the numerous other cases of a similar nature cited by appellant, under the charter of the City of New York the petition of the property owners is but the first step in the establishment of a building zone. After duly publishing that the petition has been presented to it, the Board of Estimate and Apportionment must hold hearings, and after due deliberation vote upon the advisability of creating a proposed zone. If there is opposition from the owners of a substantial part of the property affected, the vote of the Board must be unanimous, and in the event of undue hardship the parties affected have the right to appeal to the Board of Appeals for the purpose of having the resolution varied to meet their necessities.[15] The arbitrary will of a majority of property owners is at no time substituted for the discretion of the Board of Estimate and Apportionment and Board of Appeals.

In adopting these zoning resolutions the Board of Estimate must have in mind the question of whether they promote the health, safety, comfort, convenience and general welfare (Section 19). It is the practice that before the adoption of resolutions altering zones, the Board of Estimate has the benefit of the report of the city's engineers especially qualified to deal with the subject of zoning. So in the instant case the engineer made a detailed report to the Board of Estimate and Apportionment before that body acted upon the petition (Rec. pp. 11-13).

---

[15] Sections 20 and 23, Building Zone Law.

Consideration of Local Conditions.

As was suggested in the quotation from *Welch* v. *Swasey, supra,* in legislation of this kind it is important to keep in mind that various local conditions exist which must of necessity be in the forefront of the minds of the legislators and which a court, sitting many miles away, can never fully appreciate. Thus it was said by Mr. Justice Holmes in *Dominion Hotel* vs. *Arizona,* 249 U. S. 265, 268:

> "The deference due to the judgment of the legislature on the matter has been emphasized again and again. *Hebe Co.* v. *Shaw,* 248 U. S. 297, 303. Of course, this is especially true when local conditions may affect the answer, conditions that the legislature does but that we cannot know. *Cusack Co.* v. *Chicago,* 242 U. S. 526, 530, 531."

In the case of *Laurel Hill Cemetery* vs. *San Francisco,* 216 U. S. 358, it appeared that the plaintiff was a cemetery corporation; and that it purchased considerable lands in the neighborhood of San Francisco, which subsequently were included within the limits of the city. An ordinance was adopted declaring that "the burial of the dead within the city and county of San Francisco is dangerous to life and detrimental to the public health", and forbidding such burial under a penalty of fine and imprisonment. An action was brought to restrain the enforcement of the ordinance on the ground that it was unconstitutional in that it deprived plaintiff of its property without due process of law. It was also contended that cemeteries did not in fact endanger public health and that consequently the ordinance in question was unreasonable. Mr. Justice

HOLMES, speaking for this Court, said at pages 364 and 365:

> "Moreover, it is said by the Supreme Court of the State that burial within the San Francisco City or County limits already was forbidden by statute, except in existing cemeteries or such as might be established by the Board of Supervisors. The Board of Supervisors passed the ordinance now complained of; so that, as pointed out by the court, the ordinance in effect merely prohibited burials in existing cemeteries. It was, therefore, a specific determination by the lawmaking authority as to the relation of those cemeteries to their respective neighborhoods, and the question is whether the court can say that it was wrong.
>
> * * * * * *
>
> "But whatever the tribunal, in questions of this kind, great caution must be used in overruling the decision of the local authorities, or in allowing it to be overruled. No doubt this court has gone a certain distance in that direction. *Dobbins* v. *Los Angeles*, 195 U. S. 222. *Lochner* v. *New York*, 198 U. S. 45, 58 *et seq.* But it has expressed through the mouth of the same judge who delivered the judgment in the case last cited the great reluctance that it feels to interfere with the deliberate decisions of the highest court of the State whose people are directly concerned. *Welch* v. *Swasey*, 214 U. S. 91, 106. *The reluctance must be redoubled when as here the opinion of that court confirms a specific determination concerning the same spot previously reached by the body that made the law.* See *French* v. *Barber Asphalt Paving Co.*, 181 U. S. 324, 341; *Smith* v. *Worcester*, 182 Massachusetts, 232, 234, 235.
>
> "But the propriety of deferring a good deal to the tribunals on the spot is not the only ground for caution. If every member of

this Bench clearly agreed that burying grounds were centers of safety and thought the Board of Supervisors and the Supreme Court of California wholly wrong, it would not dispose of the case. There are other things to be considered. *Opinion still may be divided, and if, on the hypothesis that the danger is real, the ordinance would be valid, we should not overthrow it merely because of our adherence to the other belief.* Similar arguments were pressed upon this court with regard to vaccination, but they did not prevail. On the contrary, evidence that vaccination was deleterious was held properly to have been excluded. *Jacobson* v. *Massachusetts*, 197 U. S. 11; S. C., 183 Massachusetts, 242. See *Otis* v. *Parker*, 187 U. S. 606, 608, 609."

Again, in *Perley* vs. *North Carolina*, 249 U. S. 510, this Court laid down the same principle to be followed. There,—in order to protect from fire, watersheds held by cities for the purpose of supplying water to their inhabitants,—a statute was passed requiring the owners of timber, upon cutting or removing it from lands near to such watersheds, to remove or cause to be burned under proper supervision, the tops, boughs, etc., not desired to be taken for commercial or other purposes. This was held to be a legitimate exercise of the police power. The Court said by MR. JUSTICE MCKENNA at pages 513, 514:

"What then is the case? The City of Asheville is the owner of and conducts a reservoir, and it may be presumed that other cities of the State are in like situation, and the State, by the law in question, seeks to protect their watersheds from damage or devastating fires. The purpose is governmental, but it is contended that the regulation of the statute un-

der review is too distant from the purpose and is simply an arbitrary exercise of power. And this as a certain proposition of law, having no other basis in the record than that the forbidden litter of the cut-down and removed timber is 'absolutely harmless' and contains 'no element of injury or damage to any one' and cannot 'by any possibility be construed into a nuisance.' The assertion eludes exact estimation. 'Tree-tops, boughs, and laps' left upon the ground may not themselves be a nuisance; but they may become dry, and the more quickly and certainly so from the denudation of the land of its trees, and therefore become a source of fires and the perils and damage of fires. This was the conclusion of the courts below and, we may suppose, in application to the Asheville watershed. The conclusion is fortified by the judgment of the State expressed in the statute, and, it may be, from experience in the State and certainly from experience in other States, ignorance of which we cannot feign. We are not able, therefore, to yield to the contention of defendants that the statute is not proportionate in its regulation nor that its application to defendants' property is arbitrary and unconstitutional."

Paraphrasing the language of MR. JUSTICE MCKENNA in *Bacon* vs. *Walker*, 204 U. S. 311, in which he said "the laws and policy of a State may be framed and shaped to suit its conditions of climate and soil", we may say that the laws and policy of a State may be framed and shaped to suit the conditions caused by congestion of population and by its position as the centre of a large and ever-growing metropolitan area.

In the case of *Bacon* vs. *Walker*, *supra*, a statute adopted by the State of Idaho and sustained as a valid act under the police power, prohibited

the herding and grazing of sheep on, or within two miles of, land or possessory claims of persons other than the owner of the sheep. In the course of his opinion MR. JUSTICE MCKENNA said at pages 315, 316:

> "The laws and policy of a State may be framed and shaped to suit its conditions of climate and soil. Illustrations of this power are afforded by recent decisions of this court. In *Clark* v. *Nash*, 198 U. S. 361, a use of property was declared to be public which, independent of the conditions existing in the State, might otherwise have been considered as private. So also in *Strickley* v. *Highland Boy Gold Mining Company*, 200 U. S. 527. In the first case there was a recognition of the power of the State to deal with and accommodate its laws to the conditions of an arid country and the necessity of irrigation to its development. The second was the recognition of the power of the State to work out from the conditions existing in a mining region the largest welfare of its inhabitants. And again, in *Offeld* v. *The New York, New Haven & Hartford Railroad Company*, 203 U. S. 372, the principle of those cases was affirmed and applied to conditions entirely dissimilar, and it was declared that it was competent for a State to provide for the compulsory transfer of shares of stock in a corporation, the ownership of which stood in the way of the increase of means of transportation and the public benefit which would result from that."

And again on page 318 it was stated:

> "Contemplating the law in the aspect expressed in these questions, counsel are unable to see in it anything but unreasonable and arbitrary discrimination. This view of the power of the State, however, is too nar-

row. That power is not confined, as we have said, to the suppression of what is offensive, disorderly or unsanitary. It extends to so dealing with the conditions which exist in the State as to bring out of them the greatest welfare of its people. This is the principle of the cases which we have cited."

This Court has pointed out in *Block* vs. *Hirsh*, 256 U. S. 135, 155, that there is no particular magic attaching to real property which would grant to it an immunity from public restraint any greater than the immunity attaching to personal or intangible property. So, it was said by MR. JUSTICE HOLMES, at pages 155, 156:

"The fact that tangible property is also visible tends to give a rigidity to our conception of our rights in it that we do not attach to others less concretely clothed. But the notion that the former are exempt from the legislative modification required from time to time in civilized life is contradicted not only by the doctrine of eminent domain, under which what is taken is paid for, but by that of the police power in its proper sense, under which property rights may be cut down, and to that extent taken, without pay. Under the police power the right to erect buildings in a certain quarter of a city may be limited to from eighty to one hundred feet. *Welch* v. *Swasey*, 214 U. S. 91. Safe pillars may be required in coal mines. *Plymouth Coal Co.* v. *Pennsylvania*, 232 U. S. 531. Billboards in cities may be regulated. *St. Louis Poster Advertising Co.* v. *St. Louis*, 249 U. S. 269. Watersheds in the country may be kept clear. *Perley v. North Carolina*, 249 U. S. 510. These cases are enough to establish that a public exigency will justify the legislature in restricting property rights in land to a certain extent without compensation. But if to

answer one need the legislature may limit height to answer another it may limit rent. We do not perceive any reason for denying the justification held good in the foregoing cases to a law limiting the property rights now in question if the public exigency requires that. The reasons are of a different nature but they certainly are not less pressing."

In *Levy Leasing Co.* vs. *Siegel*, 258 U. S. 242, MR. JUSTICE CLARKE, speaking for this Court, announced the same principle, saying at pages 246, 247:

"It is strenuously argued, as it was in *Block* v. *Hirsh*, 256 U. S. 135, and in the *Marcus Brown Case*, that the relation of landlord and tenant is a private one and is not so affected by a public interest as to render it subject to regulation by the exercise of the police power.

It is not necessary to discuss this contention at length, for so early as 1906, when the Tenement House Act of New York, enacted in 1901, was assailed as an unconstitutional interference with the right of property in land, on substantially all of the grounds now urged against the Emergency Housing Laws, this court, in a *per curiam* opinion affirmed a decree of the Court of Appeals of New York (179 N. Y. 325), sustaining regulations requiring large expenditures by landlords as a valid exercise of the police power. *Moeschen* v. *Tenement House Department*, 203 U. S. 583. To require uncompensated expenditures very certainly affects the right of property in land as definitely, and often as seriously, as regulation of the amount of rent that may be charged for it can do. Many decisions of this court were cited as sufficient to justify the summary disposition there made of the question, as one even then so settled by authority as not to be longer open to discussion.

In the opinion of *Block* v. *Hirsh, supra,* this court cites in support of this same conclusion, under the circumstances there disclosed, which are not to be distinguished from those presented in this case, the later cases following: *Strickley* v. *Highland Boy Gold Mining Co.,* 200 U. S. 527; *Welch* v. *Swasey,* 214 U. S. 91; *Plymouth Coal Co.* v. *Pennsylvania,* 232 U. S. 531; *St. Louis Poster Advertising Co.* v. *St. Louis,* 249 U. S. 269; *Perley* v. *North Carolina,* 249 U. S. 510.

These authorities show that from time to time for a generation, as occasion arose, this court has held that there is no such inherent difference in property in land, from that in tangible and intangible personal property, as exempts it from the operation of the police power in appropriate cases, and in both the *Marcus Brown* and *Block Cases, supra,* it was held, in terms, that the existing circumstances clothed the letting of buildings for dwelling purposes with a public interest sufficient to justify restricting property rights in them to the extent provided for in the laws in those cases objected to."

In *Northwestern Laundry* vs. *Des Moines,* 239 U. S. 486, this Court sustained an ordinance of Des Moines forbidding the operation of laundries in certain districts, MR. JUSTICE DAY saying on page 492:

"Nor is there any valid Federal constitutional objection in the fact that the regulation may require the discontinuance of the use of property or subject the occupant to large expense in complying with the terms of the law or ordinance. Recent cases in this court are *Reinman* v. *Little Rock,* 237 U. S. 171; *Chicago & Alton R. R.* v. *Tranberger,* 238 U. S. 67; *Hadacheck* v. *Sebastian, Chief of Police,* decided December 20, 1915, *ante,* p. 394."

The same principle was enunicated in *Hadacheck* v. *Los Angeles*, 239 U. S. 394. In that case plaintiff-in-error prosecuted a writ of habeas corpus for his release from the custody of the defendant-in-error as Chief of Police of Los Angeles after his conviction of a misdemeanor for the violation of an ordinance making it unlawful to establish or operate a brick yard within certain described limits in the city. The plaintiff-in-error claimed:

> "That he has made excavations of considerable depth and covering a very large area of the property and that on account thereof the land cannot be utilized for residential purposes or any purpose other than that for which it is now used. That he purchased the land because of such bed of clay and for the purpose of manufacturing brick; that it was at the time of purchase outside of the limits of the city and distant from dwellings and other habitations and that he did not expect or believe, nor did other owners of property in the vicinity expect or believe, that the territory would be annexed to the city. That he has erected expensive machinery for the manufacture of bricks of fine quality which have been and are being used for building purposes in and about the city.
>
> "That if the ordinance be declared valid he will be compelled to entirely abandon his business and will be deprived of the use of his property.
>
> "That the manufacture of brick must necessarily be carried on where suitable clay is found and the clay cannot be transported to some other location, and, besides, the clay upon his property is particularly fine and clay of as good quality cannot be found in any other place within the city where the same can be utilized for the manufacture of brick. That within the prohibited district there is

one other brick yard besides that of plaintiff-in-error.

* * *

"That the City embraces 107.62 square miles in area and 75% of it is devoted to residential purposes; that the district described in the ordinance includes only about three square miles, is sparsely settled and contains large tracts of unsubdivided and unoccupied land; and that the boundaries of the district were determined for the sole and specific purpose of prohibiting and suppressing the business of petitioner and that of the other brick yard.

"That there are and were at the time of the adoption of the ordinance in other districts of the city thickly built up with residences brick yards maintained more detrimental to the inhabitants of the city. That a petition was filed, signed by several hundred persons, representing such brick yards to be a nuisance and no ordinance or regulation was passed in regard to such petition and the brick yards are operated without hindrance or molestation. That other brick yards are permitted to be maintained without prohibition or regulation." (Pages 405 to 407).

Mr. Justice McKenna, speaking for this Court, said at Pages 410, 413, 414:

"It is to be remembered that we are dealing with one of the most essential powers of government, one that is the least limitable. It may, indeed, seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence precluded any limitation upon it when not exerted arbitrarily. A vested interest cannot be asserted against it because of conditions once obtaining. *Chicago & Alton R. R.* v. *Tranbarger*, 238 U. S. 67, 68. To so hold would preclude development and fix a city forever in its primitive conditions. There must be progress, and if in

its march private interests are in the way they must yield to the good of the community. The logical result of petitioner's contention would seem to be that a city could not be formed or enlarged against the resistance of an occupant of the ground and that if it grows at all it can only grow as the environment of the occupations that are usually banished to the purlieus.

"It may be that something else than prohibition would have satisfied the conditions. Of this, however, we have no means of determining, and besides we cannot declare invalid the exertion of a power which the city undoubtedly has because of a charge that it does not exactly accommodate the conditions or that some other exercise would have been better or less harsh. We must accord good faith to the city in the absence of a clear showing to the contrary and an honest exercise of judgment upon the circumstances which induced its action."

In *New Orleans Gas Light Co.* v. *Drainage Commission of New Orleans,* 197 U. S. 453, it was held, that although the gas company had permission from the city to lay pipes under the streets, it might be required to remove them at its own expense, in the exercise of the police power, in order to make way for a drainage system which was required in the interest of public health, without compensation to the gas company; "and that uncompensated obedience to regulations for public safety under the police power of the State was not a taking of property without due process of law."

Cited in

Northern Pac. Ry. v. *Duluth,* 208 U. S. 583, 597.

Familiar limitations on the use of lands are found in the various restrictions upon the construction of bill-boards.

So, in *St. Louis Poster Advertising Co.* vs. *St. Louis*, 249 U. S. 269, an ordinance of the City of St. Louis allowed no bill-board of 25 square feet or more to be erected without a permit, and none to extend more than 14 feet high above the ground; requiring an open space of 4 feet between the lower edge and the ground, and forbidding an approach of nearer than 6 feet to any building or to the side of any lot or nearer than 2 feet to any other bill-board or 15 feet to any street. The ordinance likewise required a conformity to the building line, and limited bill-boards and area to 500 square feet. The bill-boards in question were all erected upon private ground owned by or let to the plaintiff. They were built to withstand a windstorm of eighty-three miles an hour, which the Court said was a greater velocity than any known in St. Louis, and the frames and facing were of galvanized iron so as to exclude all danger of fire. The plaintiff had contracts running for six months to three years binding it to maintain advertisements upon its boards. MR. JUSTICE HOLMES, in discussing the question at issue, said at pages 274, 275:

> "Possibly one or two details, especially the requirement of conformity to the building line, have aesthetic considerations in view more obviously than anything else. But as the main burdens imposed stand on other ground we should not be prepared to deny the validity of relatively trifling requirements that did not look solely to the satisfaction of rudimentary wants that alone we generally recognize as necessary. *Hubbard* v. *Taunton*, 140 Massachusetts, 467, 468.
>
> If the city desired to discourage billboards by a high tax we know of nothing to hinder, even apart from the right to prohibit them altogether asserted in the *Cusack Co. Case.*

Citizens' Telephone Co. v. *Fuller,* 229 U. S. 322, 329. As to the plaintiff's contracts, so far as appears they were made after the ordinance was passed, but if made before it they were subject to legislation not invalid otherwise than for its incidental effect upon them. *Atlantic Coast Line R. R. Co.* v. *Goldsboro,* 232 U. S. 548, 558. The same thing may be said, apart from other answers, with regard to the alleged standardizing of the size of posters."

See: *Cusack* vs. *City of Chicago,* 242 U. S. 526.

So, too, in *City of Rochester* vs. *West,* 164 N. Y. 510, the Court of Appeals said by MARTIN, J., at p. 514:

"If the defendant's authority to erect billboards was wholly unlimited as to height and dimension they might readily become a constant and continuing danger to the lives and persons of those who should pass along the street in proximity to them. That the legislature had power to pass a statute authorizing the city to adopt an ordinance which, if enforced, would obviate that danger, we have no doubt. Nor was it in conflict with any provision of the State or Federal Constitution. The fact that no injury has occurred by reason of the erection of the billboard in question, or that it is improbable that any such injury will occur therefrom, is not controlling upon the question under consideration. The validity of a statute is not to be determined by what has been done in any particular instance, but by what may be done under it. (*Stuart* v. *Palmer,* 74 N. Y. 183; *Gilman* v. *Tucker,* 128 N. Y. 190, 200.) It is equally true that the validity of a statute or ordinance is not to be determined from its effect in a particular case, but upon its general purpose and its efficiency to effect that end. When a statute is ob-

viously intended to provide for the safety of a community, and an ordinance under it is reasonable and in compliance with its purpose, both the statute and the ordinance are lawful, and must be sustained. (*Village of Carthage* v. *Frederick*, 122 N. Y. 268; *People ex rel. O. H. C. Assn.* v. *Pratt*, 129 N. Y. 68; *Mayor, etc.*, v. *D. D., E. B. & B. R. R. Co.*, 133 N. Y. 104; *City of Rochester* v. *Simpson*, 134 N. Y. 414; *People* v. *Havnor*, 149 N. Y. 195, 204.)"

An analogous situation is that which obtained in *Rideout* vs. *Knox*, 148 Mass. 368. It had been the common law in Massachusetts that one might construct a "spite fence" upon his lands. By a statute it was declared that any fence "unnecessarily exceeding six feet in height, maliciously erected or maintained for the purpose of annoying the owners or occupants of adjoining property" was a private nuisance. This statute was held by the Supreme Court of Massachusetts to be constitutional, and this Court cited the case with approval in *Camfield* vs. *United States*, 167 U. S. 518, at page 523.

In his article in the Harvard Law Review,[15] Mr. Bettman points out that:

"The law concerning highway obstruction furnishes another analogy. The owner of property abutting on a street may be forbidden to place a permanent or temporary obstruction across the sidewalk. The owner of a skyscraper might, within the bounds of reason, be held to contribute more than his fair share of street obstruction, in the stream of pedestrians and vehicles which he draws to or pours out from his property. The law may constitutionally prohibit the abutting

[15] *37 Harvard Law Review*, Pages 838, 839.

property owner from staging in his show window an entertainment that would tend to attract a crowd to that part of the street. The very number of persons or vehicles drawn to a section of the street by the high buildings located along it may be equally obstructive. *Limitations of height or of other forms of building intensity have an obvious relationship to freedom of movement on the highway and to traffic control.*

The regulation of intensity of building development, as a means of preventing excessive gathering of human beings within a designated space, is a recognized mode of constitutional exercise of the police power. Tenement-house and factory regulations specify standard minima of space *per capita* of occupants or operatives. Analogously, the zone plan measures the territory of the city available for development, estimates the number of human beings who will live and work within the territory during the period of the life of the ordinance, gathers the topographic, economic, and social facts of the territory, and, applying recognized principles of health, safety, economic prosperity, convenience, and so forth, to these measurements, estimates and facts, determines such distribution of future residential, business, industrial, and public structures, and such standards of bulk and height of buildings, as will moderate unwholesome and inconvenient congestion during the process of the growth of the city's population, business, and industry. *Zoning is an application to the whole territory of the community of the same basic motives and principles as justify, in the constitutional sense, the right to regulate congestion within the space of an individual piece of property or plant.* **Building laws specify standards of sunlight within the workshop or apartment. Building-height limitation is designed, among**

other results, to regulate the amount of darkness which one building may throw into adjacent buildings or into those across the street."

In *District of Columbia* vs. *Brooke*, 214 U. S. 139, an act required the owner of each lot in the District of Columbia to connect the same with the water main and sewer maintained by the District. The defendant-in-error contended "that the record fails to disclose that any nuisance existed on her property, or that the means of drainage already used was unsanitary or insufficient, or that any necessity existed for making a connection". This Court said at page 148:

> "But suppose the fact had been alleged, a property owner cannot urge against the drainage system of the District that he had adopted a system of his own and challenge a comparison with that of the District, and obey or disobey the law according to the result of the comparison. The contention virtually denies any power in Congress to create a system of drainage to which a lot owner must conform."

In passing on the right of Congress to make a distinction between residents and non-residents in the enforcement of the act under the Fourteenth Amendment, the Court said at page 150:

> "Passing on that Amendment, we have repeatedly decided—so often that a citation of the cases is unnecessary—that it does not take from the States the power of classification. And also that such classification need not be either logically appropriate or scientifically accurate. The problems which are met in the government of human beings are different from those involved in the examination of the objects of the physical world and

assigning them to their proper associates. A wide range of discretion, therefore, is necessary in legislation to make it practical, and we have often said that the courts cannot be made a refuge from ill-advised, unjust or oppressive laws. *Billings* v. *Illinois*, 188 U. S. 97; *Heath & Milligan Manufacturing Co. et al.* v. *Worst*, 207 U. S. 338."

Average Reciprosity of Advantage.

This Court has frequently reiterated the doctrine that the State has power to impose burdens upon property or to cut down its value in various ways without compensation, as a branch of the police power. This has sometimes been upheld by what this Court has called "the average reciprocity of advantage" although in particular cases the advantages may not be equal.

Jackman vs. *Rosenbaum Co.*, 260 U. S. 22; 30.

Noble State Bank vs. *Haskell*, 219 U. S. 104; 109.

Wurts vs. *Hoagland*, 114 U. S. 606; 613 to 614.

Fallbrook Irrigation District vs. *Bradley*, 164 U. S. 112.

Barbier vs. *Connolly*, 113 U. S. 27.

See also:

People ex rel. Griffin vs. *The Mayor*, 4 N. Y. 419; 438.

In *Noble State Bank* vs. *Haskell, supra*, a statute of Oklahoma created a State Banking Board, and directed it to levy upon every bank existing under the laws of the State an assessment of one per

cent., subsequently increased to five per cent., of the bank's average daily deposits, with certain deductions, for the purpose of creating a Depositors' Guaranty Fund. The purpose of the fund was to secure full repayment of deposits, and when a bank became insolvent and went into the hands of the Bank Commissioner, if its cash immediately available was not sufficient to pay depositors in full, the Banking Board was required to draw from the Depositors' Guaranty Fund the amount needed to make up the deficiency. The statute reserved a lien upon the assets of the failing bank to make good the sum taken from this fund. The plaintiff argued that the assessment was a taking of private property for a private use without compensation and therefore without the police power. Mr. Justice Holmes in writing the opinion of this Court stated at pages 110 to 111:

> "Nevertheless, notwithstanding the logical form of the objection, there are more powerful considerations on the other side. In the first place it is established by a series of cases that an ulterior public advantage may justify a comparatively insignificant taking of private property for what, in its immediate purpose, is a private use. *Clark* v. *Nash*, 198 U. S. 361. *Strickley* v. *Highland Boy Mining Co.*, 200 U. S. 527, 531. *Offeld* v. *New York, New Haven & Hartford R. R. Co.*, 203 U. S. 372. *Bacon* v. *Walker*, 204 U. S. 311, 315. And in the next, it would seem that there may be other cases beside the every day one of taxation, in which the share of each party in the benefit of a scheme of mutual protection is sufficient compensation for the correlative burden that it is compelled to assume. See *Ohio Oil Co.* v. *Indiana*, 177 U. S. 190. At least, if we have a case within the reasonable exercise of the police power as above explained, no more need be said.

> It may be said in a general way that the police power extends to all the great public needs. *Camfield* v. *United States*, 167 U. S. 518. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare."

Wurts vs. *Hoagland, supra,* involved the constitutionality of a statute of New Jersey which provided for the drainage of any tract of low or marshy land within the State, upon proceedings instituted by at least five owners of separate lots of land included in the tract, where no objection was raised by owners of the greater portion of the tract. The statute further provided that thereupon a survey was to be made and a report of its findings to the Supreme Court of the State; the Court shall thereupon appoint three commissioners to superintend and carry out the system of drainage so adopted and reported, after giving notice by publication, unless the Court received written remonstrance of the owners of a majority of the low or wet lands to the effect that they opposed the drainage plan. After the tract was drained the commissioners were to report to the Supreme Court, which thereupon, upon notice, and after giving an opportunity to the interested parties to be heard, was "to distribute and assess the amount of said expense and interest, upon the lands contained within the territory reported by them originally, or as corrected by the Supreme Court, in proportion, as near as they can judge, to the benefit derived from said drainage by the several parcels of land to be assessed". The court held that an assessment so made did not deprive the protesting owners of property without due

process of law nor deny to them the equal protection of the laws within the contemplation of the Fourteenth Amendment. MR. JUSTICE GRAY said for the Court at pages 613, 614, 615:

> "This review of the cases clearly shows that general laws for the drainage of large tracts of swamps and low lands, upon proceedings instituted by some of the proprietors of the lands to compel all to contribute to the expense of their drainage, have been maintained by the courts of New Jersey (without reference to the power of taking private property for the public use under the right of eminent domain, or to the power of suppressing a nuisance dangerous to the public health) as a just and constitutional exercise of the power of the legislature to establish regulations by which adjoining lands, held by various owners in severalty, and in the improvement of which all have a common interest, but which, by reason of the peculiar natural condition of the whole tract, cannot be improved or enjoyed by any of them without the concurrence of all, may be reclaimed and made useful to all at their joint expense. The case comes within the principle upon which this court upheld the validity of general mill acts in *Head* v. *Amoskeag Manufacturing Co.*, 113 U. S. 9.
>
> * * * * * * * *

In the case of *Barbier* vs. *Connolly, supra*, this Court upheld the constitutionality of a municipal ordinance of the City of San Francisco prohibiting persons from washing and ironing in public laundries and wash houses within defined territorial limits between the hours of 10 o'clock at night and 6 o'clock in the morning. The opinion of MR. JUSTICE FIELD with respect to the application of the Fourteenth Amendment to this ordi-

nance is pertinent to the instant case. He said at pages 31, 32:

> "But neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains. *Special burdens are often necessary for general benefits—for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon any one, but to promote, with as little individual inconvenience as possible, the general good.* Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects all persons similarly situated, is not within the amendment.
>
> *In the execution of admitted powers unnecessary proceedings are often required which are cumbersome, dilatory and expensive, yet, if no discrimination against any one*

be made and no substantial right be impaired by them, they are not obnoxious to any constitutional objection. The inconveniences arising in the administration of the laws from this cause are matters entirely for the consideration of the State; they can be remedied only by the State. In the case before us the provisions requiring certificates from the health officer and the Board of Fire Wardens may, in some instances, be unnecessary, and the changes to be made to meet the conditions prescribed may be burdensome, but, as we have said, this is a matter for the determination of the municipality in the execution of its police powers, and not a violation of any substantial right of the individual."

In *Missouri Pacific R. R. Co.* vs. *Road District,* 266 U. S. 187, a special road improvement was contemplated by an Arkansas statute creating an improvement district. The improvement was abandoned after preliminary publication and inquiry because it was found that the cost would probably exceed the benefits to the land included in the improvement district. The property owners in the improvement district were thereupon assessed for the purpose of defraying the expenses of the inquiry. Although no benefit was received by the land owners, the Court held that the State was nevertheless entitled to assess their lands for the costs incurred. MR. JUSTICE BRANDEIS said on page 190:

"A State may defray the cost of constructing a highway, in whole or in part, by means of a special assessment upon property specially benefitted thereby. But it is not obliged to do so. Road building is a public purpose which may be effected by general taxation. The cost may be defrayed out of state funds;

or a tax district may be created to meet the authorized outlay. The preliminary enquiry whether it is desirable to construct the road, is one in which all landowners within the district are interested. The Fourteenth Amendment does not require that taxes laid for this purpose shall be according to the benefits to be received by the person or thing taxed. Compare *Kelly* v. *Pittsburgh*, 104 U. S. 78. The cost of making the investigation may be met by a fixed charge per acre, as in *Houck* v. *Little River Drainage District*, 239 U. S. 254, and *Miller & Lux* v. *Sacramento & San Joaquin Drainage District*, 256 U. S. 129, or by distributing the cost over all the land in the district in proportion to its value as assessed for county and state taxation, or otherwise. The fact that the money to be raised by this tax will be applied toward defraying the expenses of an abandoned road project, and not to the cost of a road wholly or partly completed, is obviously immaterial. *Houck* v. *Little River Drainage District, supra*, p. 265.

There is here no suggestion of that flagrant abuse or purely arbitrary exercise of the taxing power against which the Federal Constitution affords protection. *Valley Farms Co.* v. *Westchester*, 261 U. S. 155, 163; *Thomas* v. *Kansas City Southern Ry. Co.*, 261 U. S. 481, 483."

House v. *Road Imp. Dist.* 266 U. S. 175, 177.

Although it must be clear from the quotations heretofore made from the reports rendered to the Board of Estimate and Apportionment prior to the adoption of the Building Zone Resolution that the same was designed to promote the public health, morals and safety, the police power is by no means limited to such purposes. It has been extended to governmental acts "designed to pro-

mote the public convenience or the general prosperity".

C. B. & Q. Ry. Co. vs. *Drainage Comm'rs.*, 200 U. S. 561; 592.
Chicago & Alton R. R. Co. vs. *Tranbarger*, 238 U. S. 67.

In the first of these cases the plaintiff-in-error had constructed a railroad bridge over a natural watercourse, crossing its right of way under its general corporate power. By an act of the legislature of Illinois the drainage commissioners were authorized to drain and make capable of cultivation a large body of land, partly swamp or slough lands. The plan required the enlargement and deepening of the channel of a natural watercourse running through the district and under this railroad bridge. It appeared that the plan could not be carried out unless the timbers and stones in the creek, placed there by the railway company when it constructed the foundation for its present bridge, were removed. These timbers and stones could not be removed without destroying the foundation of the existing bridge and rendering it necessary to construct another bridge, with an opening underneath wide enough to permit a sufficient channel to carry off the water of the creek as increased in volume under the drainage system. This Court held that it was the duty of the railway company, at its own expense, to remove from the creek, the existing bridge, culvert, timbers and stones placed there by it, and unless it abandoned its right to cross the creek, to erect at its own expense and maintain a new bridge that would conform to the regulations established by the drainage commissioners under the authority of the

State. This was held not to amount to a taking of private property for public use within the meaning of the constitution, nor was it a denial of the equal protection of the laws, MR. JUSTICE HARLAN saying at pages 592, 593, 594:

> "The learned counsel for the railway company seem to think that the adjudications relating to the police power of the State to protect the public health, the public morals and the public safety are not applicable, in principle, to cases where the police power is exerted for the general well-being of the community apart from any question of the public health, the public morals or the public safety. Hence, he presses the thought that the petition in this case does not, in words, suggest that the drainage in question has anything to do with the health of the Drainage District, but only avers that the system of drainage adopted by the Commissioners will reclaim the lands of the District and make them tillable or fit for cultivation. We cannot assent to the view expressed by counsel. **We hold that the police power of a State embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals or the public safety.** *Lake Shore & Mich. South. Ry.* v. *Ohio*, 173 U. S. 285, 292; *Gilman* v. *Philadelphia*, 3 Wall. 713, 729; *Pound* v. *Turck*, 95 U. S. 459, 464; *Railroad Co.* v. *Husen*, 95 U. S. 470. And the validity of a police regulation, whether established directly by the State or by some public body acting under its sanction, must depend upon the circumstances of each case and the character of the regulation, whether arbitrary or reasonable and whether really designed to accomplish a legitimate public purpose.
>
> * * *

> If the injury complained of is only incidental to the legitimate exercise of governmental powers for the public good, then there is no taking of property for the public use, and a right to compensation, on account of such injury, does not attach under the Constitution."

In *Chicago & Alton R. R. Co.* vs. *Tranbarger, supra,* the defendant-in-error brought an action to enforce a statute of Missouri against the plaintiff-in-error which required every railroad corporation within three months after the completion of the same to cause to be constructed and maintained suitable openings across and through the right of way and roadbed and suitable ditches and drains along the roadbed to connect with ditches, drains or watercourses so as to afford sufficient outlet to drain water along the railroad when the draining of such water was obstructed or rendered necessary by the construction of the railroad. The act in question was adopted in 1899 and amended in 1907. The railroad was first constructed at the point in question in 1872 and completed in its then condition in 1895. Mr Justice Pitney, in rendering the decision of this Court, said at pages 76, 77:

> "It is established by repeated decisions of this court that neither of these provisions of the Federal Constitution has the effect of overriding the power of the State to establish all regulations reasonably necessary to secure the health, safety, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise. *Atlantic Coast Line* v. *Goldsboro,* 232 U. S. 548, 558, and cases cited. And it is also settled that the police power embraces

> regulations designed to promote the public convenience or the general welfare and prosperity, as well as those in the interest of the public health, morals, or safety. *Lake Shore & Mich. Southern Ry.* v. *Ohio,* 173 U. S. 285, 292; *C., B. & Q. Ry.* v. *Drainage Commissioners,* 200 U. S. 561, 592; *Bacon* v. *Walker,* 204 U. S. 311, 317."

In the case of *Pennsylvania Coal Co.* v. *Mahon,* 260 U. S. 393, 413, MR. JUSTICE HOLMES said:

> "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power."

See opinion of JUDGE PECKHAM in *Health Department* v. *Rector, supra,* in which he said at page 43:

> "Laws and regulations of a police nature, though they may disturb the enjoyment of individual rights, are not unconstitutional, though no provision is made for compensation for such disturbances. They do not appropriate private property for public use, but simply regulate its use and enjoyment by the owner. If he suffer injury, it is either *damnum absque injuria,* or, in the theory of the law, he is compensated for it by sharing in the general benefits which the regulations are intended and calculated to secure (1 Dillon on Mun. Corp. [4th ed.] Sec. 141 and note 2; *Com.* vs. *Alger,* 7 Cush., 83, 84, 86; *Baker* vs. *City of Boston,* 12 Pick., 184, 193; *Clark* vs. *Mayor of Syracuse,* 13 Barb., 32, 36."

Whether an act be contrary to public policy does not present a Federal question and will not be considered by this Court.

Endicott-Johnson Corp. vs. *Encyclopedia Press,* 266 U. S. 285, 290.

Zoning Ordinances sustained in other State jurisdictions.

In *Lincoln Trust Company* vs. *Williams Building Corporation, supra,* the New York Court of Appeals cited, with approval, an *Opinion of the Justices of the Supreme Court of Massachusetts,* 127 N. E. 525, where it was said:

> "An ordinance or by-law which segregates manufacturing and commercial buildings on the one side, from homes and residences on the other, is justified by the broad conceptions of the police power created by amendment 60. It might be warranted independent of that amendment under appropriate circumstances, at least to a limited extent, in the interests of the public health, safety or morals. The establishment of fire limits, the exclusion of wooden buildings therefrom, and the requirement of buildings of specified construction within them, are familiar police regulations of unquestionable validity. Restrictions respecting air spaces and distances between outside walls of buildings, interior fire proof walls, fire escapes and kindred matters, are not uncommon. Stevens, Landowner, 228 Mass., 368, 117 N. E., 588, and cases collected. A limitation of the height of buildings varying according to different districts had been upheld before the amendment. *Welch* vs. *Swasey,* 193 Mass., 364 79 N. E., 745, 118 Am. St. Rep., 523, 23 L. R. A. (N. S.), 1160, affirmed in 214 U. S., 91, 29 Ct. 567, 53 L. Ed., 923. The terms of section 1 of the pro-

posed act authorize great freedom of action to the several cities and towns both in the establishment of parts for the exclusive use of named industries and in regard to the kinds of construction to be permitted. Under its terms owners of vacant land in certain parts of a city or town may be utterly prohibited from erecting a building for any residential use whatever and compelled to devote it exclusively to a designated industry. Other landowners in other specified places may be required to hold their vacant land solely for residential purposes, and deprived of the privilege of utilizing it for commerce, trade or manufacture. While the proposed act does not apply to existing structures or uses, no alteration can be made looking to a substantially different use except in accordance with the act and ordinances or by-laws adopted pursuant to its authority. It needs no argument to demonstrate that the exercise of such power in many conceivable instances would be a serious limitation upon what have been commonly regarded as incidents of ownership. All this, however, is clearly within the purview of amendment 60."

Three recent cases decided by the Supreme Court of Massachusetts to the same effect are:

Building Inspector of Lowell vs. *Stoklosa*, 145 N. E. 262; 247 Mass.

Spector vs. *Building Inspector of Milton*, 145 N. E. 265; 247 Mass.

Brett vs. *Building Commissioner of Brookline*, 145 N. E. 269; 247 Mass.

Among the recent decisions by State Courts on the constitutionality of zoning is that by the Supreme Court of California in *Zahn* vs. *Board of Public Works of the City of Los Angeles* (decided

February 27, 1925), holding constitutional a series of "General and Comprehensive" Zoning Ordinances for that City. In the course of the opinion rendered by LENNON, J., it was said:

> "Thus viewed, the ordinance in the instant case is not an arbitrary attempt of the city authorities or discriminate between the uses of property in one territory and the use of property permitted in another of similar description, but on the contrary, the districts created by the ordinance and its various amendments appear to be established by a rational general rule.
>
> The fact that the inclusion of the petitioners' property in zone 'B' rather than in zone 'C' depreciates its value is not of controlling significance. Every exercise of the police power is apt to affect adversely the property interest of somebody. (*Spector* v. *Building Inspector of Milton,* 145 N. E. 265, 267.) The provisions of the enabling act concerning the conservation of property values have reference to the property value in the district as a whole and not to any particular piece of property. It is to be noted in this behalf that the finding of the referee is that the value of other property along Wilshire Boulevard which has been restricted against uses for business purposes by deed will be depreciated if the tract of land in which propertioners' property is located be included in zone 'C'.
>
> As to the objection that the ordinance was not retrospective but permitted the continuance of existing uses, it will suffice to say that for the purpose of zoning it is not necessary that existing uses shall be removed. (*Spector* v. *Building Inspector of Milton, supra.*) The ordinance was enacted with the purpose of directing the present and future development of the city and no attempt was made to remold its past development. To have re-

quired, preliminarily to an enactment for future development, that all past development, not in harmony therewith, should be removed might be impractical. That the council did not attempt such a task has no tendency to show discrimination against property to be developed in the future.

The power of the city council to zone is not limited in our opinion to the protection of established districts. To so hold would be to defeat in a large measure the very purpose of zoning which is to control future development in the best interest of the city. Zoning in its best sense looks not only backward to protect districts already established but forward to aid in the development of new districts according to a comprehensive plan having as its basis the welfare of the city as a whole.

* * * * * *

It will be noted, as previously indicated, that the findings show that upon the creation of the city planning commission of the City of Los Angeles, a study was undertaken by the commission of the entire city, district by district, for the purpose of the enactment by the city council of a comprehensive zoning ordinance; that the maps of the proposed zones were posted and public hearings had; that such zone maps after due consideration were presented to the city council with the recommendation of the city planning commission; that in the instant case the petitioners were given an opportunity to be heard before the city council; and that the inclusion in zone 'B' of the territory in which petitioners' property is located was made upon the recommendation of the public welfare commission of the city council, to whom the protest of the petitioners had been referred for investigation."

An excellent opinion by Mr. Justice Owen, speaking for the Supreme Court of Wisconsin, is to be found in *State ex rel. Carter* vs. *Harper*, 196 N. W. 451 (1923), which generally reviews the authorities. On page 453 it is stated:

> "If in the prosecution of governmental functions it becomes necessary to take private property, compensation must be made. But incidental damages to property resulting from governmental activities, or laws passed in the promotion of the public welfare, are not considered a taking of the property for which compensation must be made."

After citing *C. B. & Q. Ry.* vs. *Drainage Commissioners*, 200 U. S. 561, he says:

> "Except in cases of nuisance, there is a reciprocity of benefits resulting from limitations imposed upon the use of property by general laws. He who is limited in the use of his property finds compensation therefor in the benefits accruing to him from the like limitations imposed upon his neighbor. This principle was pointed out in Piper *v.* Eckern, 180 Wis. 588, 194 N. W. 159, and furnishes the distinction between the fate of section 4444g, Stats. 1921, there condemned, and section 4444f, Stats. 1923, which was held a constitutional enactment in State ex rel. Anthony *v.* Kelfisch *v.* Wisconsin Telephone Co. (Wis.) 195 N. W. 544, decided October 16, 1923. In the former case it was held that the statute was enacted purely for the protection of the state capitol, and that, as the state could not take private property to be used as a site for its capitol, no more could it limit the use of property for protection of the capitol. The later statute, however, was general in its operation throughout the state and was not limited to the special and selfish purpose which characterized the former. All

those whose property is affected by the latter statute are compensated by the restrictions placed upon their neighbors.

* * * * * *

The benefits to be derived to cities adopting such regulations may be summarized as follows: They attract a desirable and assure a permanent citizenship; they foster pride in and attachment to the city; they promote happiness and contentment; they stabilize the use and value of property and promote the peace, tranquility, and good order of the city. We do not hesitate to say that the attainment of these objects affords a legitimate field for the exercise of the police power. He who owns property in such a district is not deprived of its use by such regulations. He may use it for the purposes to which the section in which it is located is dedicated. That he shall not be permitted to use it to the desecration of the community constitutes no unreasonable or permanent hardship and results in no unjust burden.

* * * * * *

It seems to us that aesthetic considerations are relative in their nature. With the passing of time, social standards conform to new ideals. As a race, our sensibilities are becoming more refined, and that which formerly did not offend cannot now be endured. That which the common law did not condemn as a nuisance is now frequently outlawed as such by the written law. This is not because the subject outlawed is of a different nature, but because our sensibilities have become more refined and our ideals more exacting. Nauseous smells have always come under the ban of the law, but ugly sights and discordant surroundings may be just as distressing to keener sensibilities. The rights of property should not be sacrificed to the pleasure of an ultra-aesthetic taste. But whether they should be permitted to plague the average or

dominant human sensibilities well may be pondered.

* * * * * *

In discussing piecemeal zoning the Court continued:

> "*Manifestly there is a plain distinction between such efforts and a broad, comprehensive plan involving the entire city, and affecting all residents therein alike in an effort not to promote the desires of a majority of the people of a given district, but to promote the welfare of the city as a whole.* It seems that this distinction, which we regard as substantial and fundamental, was not regarded as important by the Minnesota court. In a later decision, however (State *v.* Houghton, 144 Minn. 1, 174 N. W. 885, 176 N. W. 159, 8 A. L. R. 585, in the opinion on rehearing), the court seems to have taken a different view of such legislation, and it seems doubtful whether the court, as then constituted, would have sanctioned the conclusion reached in the former case."

To the same effect are *State* vs. *City of New Orleans,* 97 So. 440 (1923), and *City of New Orleans* vs. *Liberty Shop,* 101 So. 798 (1924), decided by the Supreme Court of Louisiana; *Ware* vs. *City of Wichita,* 214 Pac. 99 (1923), which is a decision of the Supreme Court of Kansas **in which area district restrictions were upheld as constitutional;** and *City of Des Moines* vs. *Manhattan Oil Co.,* 184 N. W. 823, in which the Supreme Court of Iowa also sustained the building zone law, wherein it appeared that the defendant had contracted to purchase the land in question for the purpose of erecting a gasoline station prior to the adoption of the ordinance restricting the

use of the district in which the property was situated.

Valuable quotations might be made from any and all of the cases just cited, and it is only in consideration of the already voluminous size of this brief that these cases are not considered in greater detail. Their effect, however, is cumulative and shows the great weight of judicial opinion supporting the constitutionality of general zoning ordinances.

Two cases decided by the Court of Common Pleas, in Ohio, specifically sustain the constitutionality of zoning ordinances that forbid the erection of apartment houses in certain residential districts.

Kahn Brothers v. *Youngstown,* 25 Ohio N. P. (N. S. 1924) 31;
State ex rel. Morris v. *East Cleveland,* 22 Ohio N. P. (N. S. 1920) 549.

The neighborhood affected by the Amendment of October 20, 1922.

It cannot be said that the legislature or the Board of Estimate and Apportionment has acted in an arbitrary manner in encouraging districts in which men may own their own small homes. The fact that it is not feasible, in a city as large in area and population and historically as old as New York, to provide for detached houses and the erection of structures on only fifty per centum of a lot throughout the city does not make such restrictions confiscatory when applied to newer and less developed areas within the city.

The "E" zone does not apply to business or commercial districts—solely to residential. It may be that the balance of utilities makes it impracticable to enforce an "E" zone in all residential areas as where the district has been fully

built up or a particular structure completely erected. The application of the "E" zone to such a neighborhood might accentuate the housing shortage and cause untold misery.

Conversely, the fact that in more sparsely settled communities, in other parts of the country, the restrictions of an "E" zone may hamper local development or be unnecessary for the general welfare of such communities does not take such legislation out of the police power when applied to the City of New York.

The fact that some of the older cases frown upon building restrictions does not make them unconstitutional when adopted at this time and applied to a city with as great and dense a population as that of New York.

As was said in *Klein* vs. *Maravelas,* 219 N. Y., 383, 386, wherein the Court of Appeals overruled its prior decision that the Bulk Sales Act was unconstitutional, by Mr. Justice Cardozo:

> "The needs of successive generations may make restrictions imperative to-day which were vain and capricious to the vision of times past (*People* vs. *Schweinler Press,* 214 N. Y., 395)."

Appellant complains that it cannot house forty families on its lot in an "E" zone. It cannot see that there is any relation between the general health and welfare of its community and such restrictions. It would rebuild in the outlying parts of Kings County the congested slums of the lower Manhattan and Brownsville sections of the city. Against such developments, zoning is a prophylaxis; it anticipates the evils and attempts to immunize the community against them.[16]

---

[16] Commission on Districts and Restrictions—Final Report—June 2, 1916. Published by the City of New York. Board of Estimate and Apportionment. Committee on the City Plan 1916—Pages 122-123, 83-85.

It is therefore important to bear in mind the nature of the particular section of the city to which the amendment complained of refers.

The Midwood Manor section of Brooklyn, in which the property of the plaintiff-in-error is situated, was peculiarly well adapted for the encouragement of such developments. Whereas prior to October 20, 1922, the Midwood Manor section was zoned for residential purposes in a height district permitting of structures as high as the width of the street and in a "C" area zone, the development west of Coney Island Avenue, which alone was open to business uses and which fronted on a trolley line, was of one and two-family detached houses. (See Appendix B for "C" Zone Requirements.)

Concerning one and two family houses see the report of June 2, 1916, to the Board of Estimate and Apportionment, *supra* at pages 13-14, 16, 17-18, 21, 25-26, 29 and 32.

This district had been developed under restrictive covenants to which the land of plaintiff-in-error was subject until January 1st, 1923, and which included a requirement for a thirty-foot set back on East 10th Street and a twenty-foot set back on the corner of Avenue J and East 10th Street. Under these covenants only detached houses were permitted. (See general restrictions on map of Midwood Manor printed opposite Record, p. 42).

As was pointed out in the quotation from the statements of Professor Whipple and President Purdy before the Advisory Committee to the Committee on Heights of Buildings of the Board of Estimate and Apportionment, *quoted supra*, it is into such a district that—

> "Tenement houses, more euphoniously called apartment houses, built to the full limit

allowed by law, have intruded into a territory beautifully developed with single family dwellings at great cost, well constructed, in condition to last for a hundred years, and have destroyed their value in large measure. *The first tenement house when it can freely steal its light and air is profitable.* When it must depend on the light and air it furnishes for itself, on its own lot, it frequently becomes unprofitable".

The erection of such a building creates fictitious land values and *"individual houses built to secure the maximum amount of light and air suddenly find their windows blanketed by high walls on adjoining property"*.

And this is precisely what the plaintiff-in-error here sought to effect. It sought to impose the shade, the noise, the grime of its forty family tenement upon the neighborhood, while it reaped the benefit of its location among the surrounding yards and courts and low built dwellings. Even before the restrictive covenants expired it filed plans and commenced to excavate for the erection of the identical building for the construction of which it now seeks a permit (*Rec. pp.* 5 to 6, and 39). One of the intervenors herein, Pauline R. Kalvin, on October 20, 1922, obtained from the Supreme Court, Kings County, a temporary injunction restraining the plaintiff-in-error from building its contemplated forty-family tenement in violation of these covenants, the injunction expiring with the covenants on January 1, 1923. (*Rec.*, pp. 38, 39).

The amendment of October 20, 1922, and the method of its adoption.

On the same day, October 20, 1922, the Board of Estimate and Apportionment adopted a resolution amending Area District Map, Section No. 22, so as to include a strip approximately three blocks long including plaintiff's premises in an "E" area zone. The map appearing in the Record opposite page 38 shows the "E" zone as it existed prior to October 20, 1922; the shaded portion indicates the part incorporated in the "E" zone by the amendment. (See Appendix B for "E" zone requirements.)

By this amendment the entire Midwood Manor section was included in an "E" zone with the exception of the lots fronting on Coney Island Avenue to a depth of 100 feet. Coney Island Avenue has a two-track street car line along it and is zoned for business uses. From a line 100 feet west of Coney Island Avenue between the railroad cut and Avenue K as far west as Ocean Parkway, the property is zoned for residential purposes.

It is stated with respect to this amendment on page 75 of the brief of plaintiff-in-error: "*Plaintiff in Error cannot claim that its case is one of peculiar hardship. It is, under the provisions of the ordinance, in the same position as all other property holders in E Area District.*" (Italics ours.)

As the Area District Map applied prior to the amendment in question, East 10th Street was completely within a "C" zone excepting the westerly corners of Avenues I and J. In other words, directly across the street from the property of plaintiff-in-error, the corner on which the

home of the intervenor Pauline R. Kalvin is situated, was restricted by the provisions of an "E" zone; diagonally across Avenue J, the corner was likewise so restricted. If the plaintiff could build a forty-family tenement so could all other property owners across East 10th Street and most of the property owners on the west side of East 10th Street. This would have been not only injurious but unfair to the corner occupants on Avenues I and J on East 10th Street.

The immediate effect of the amendment was, therefore, to equalize the zoning requirements along East 10th Street.

Section 23 of the Building Zone Law provides for the method of amending the same.

> "*Amendments, alterations and changes in district lines.*—The Board of Estimate and Apportionment may from time to time on its own motion or on petition, after public notice and hearing, amend, supplement or change the regulations and districts herein established. Whenever the owners of 50 per cent. or more of the frontage in any district or part thereof shall present a petition duly signed and acknowledged to the Board of Estimate and Apportionment requesting an amendment, supplement, change or repeal of the regulations prescribed for such district or part thereof, it shall be the duty of the Board to vote upon said petition within 90 days after the filing of the same by the petitioners with the secretary of the Board. If, however, a protest against such amendment, supplement or change be presented, duly signed and acknowledged by the owners of 20 per cent. or more of any frontage proposed to be altered, or by the owners of 20 per cent. of the frontage immediately in the rear thereof, or by the owners of the 20 per

> cent. of the frontage directly opposite the frontage proposed to be altered, such amendment shall not be passed except by the unanimous vote of the Board. If any area is hereafter transferred to another district by a change in district boundaries by an amendment, as above provided, the provisions of this resolution in regard to buildings or premises existing at the time of the passage of this resolution shall apply to buildings or premises existing at the time of passage of such amendments in such transferred area."

On pages 39 to 40 of the *Record* is printed the property-owners' petition for the change of zone now under consideration.

The procedure of the Board of Estimate and Apportionment in adopting the amendment appears in the *Record*, pages 11 to 13. It appears that affidavits of publication showing that the matter had been duly advertised were presented to the Board (*Rec.*, p. 11). The Sub-Committee of the Board, on City Plan and Public Improvements, reported in favor of the proposed amendment and transmitted a report of the Chief Engineer of the Board which is printed in full on page 12 of the Record. *Plaintiff-in-error was represented at the hearing by counsel who opposed the resolution in his behalf* (*Rec.*, p. 13). The Board of Estimate and Apportionment thereupon adopted the amending resolution without a dissenting vote (*Rec.*, p. 13). The President of the Board of Aldermen was apparently not present, but a unanimous vote was not required under Section 23 unless 20 per cent. or more of the frontage proposed to be altered, or immediately in the rear or directly opposite the frontage proposed to be altered, presented a duly signed and acknowledged protest to the proposed change.

There was no contention here that 20 per cent. of such property owners opposed the resolution.

The Board must be presumed to have had in mind the report of its Committee quoted, *supra*, stating:

> "Light and air are so important that their provision should be required in every section of the city up to that point at which their benefits as to that particular section tend to be outweighed by other needs and requirements of city life."

It will be seen therefore that the proposed amendment was duly advertised; a Sub-Committee of the Board of Estimate and Apportionment considered the proposed amendment and the report of the Chief Engineer of the Board, which was submitted with the approval of the Sub-Committee to the entire Board of Estimate and Apportionment. A public hearing was then held at which plaintiff-in-error appeared in opposition and was represented by counsel. Other interested property owners appeared by counsel in favcr of the resolution, and the same was adopted. These facts clearly distinguish this case from *Eubank* vs. *City of Richmond, supra,* where, upon a mere petition, the city officials were required to fix a building line without considering the merits of the application, without having any discretion as to whether or not a building line should be established at all, and without granting dissenting property owners an opportunity to be heard.

In the instant case the amendment was adopted by due process of law.

Campbell vs. *City of Olney,* 262 U. S. 352;
Butters vs. *Oakland,* 263 U. S. 162.

In the former case it was held that an assessment against abutting property owners by the City of Olney was with due process of law where the property owners had an opportunity to be heard and an opportunity for review. MR. JUSTICE BUTLER, delivering the opinion of this Court, said on page 354:

> "Plaintiff-in-error had opportunity to be heard before the city council and was allowed a reasonable time after the assessment to bring suit to set it aside or to correct it or any proceeding with reference thereto. He failed to avail himself of the rights so given him by state laws. Their validity was not drawn in question. His claim that he was denied due process of law is not even colorable. *Valley Farms Co.* vs. *County of Westchester,* 261 U. S. 155; *Withnell* vs. *Ruecking Construction Co.,* 249 U. S. 63; 69; *Hibben* vs. *Smith,* 191 U. S. 310, 321, *et seq.; French* vs. *Barber Asphalt Paving Co.,* 181 U. S. 324, 334, 344, and cases cited."

In *Butters* vs. *Oakland, supra,* it was stated by MR. JUSTICE SUTHERLAND at page 164:

> "1. Plaintiffs in error contend that the assessment was not in proportion to the benefits because certain property, also benefitted by the improvement, was omitted from the district. Without reviewing the circumstances said to establish this contention, it is enough to say that the municipal authorities were empowered to establish the district benefitted and to assess the tax in proportion to the benefits. *Ample provision is made for a hearing and a hearing was accorded. There is nothing to justify the conclusion that the authorities acted arbitrarily or fraudulently. The assessment was reviewed upon appeal by the City Council, and that body, after a hear-*

ing, altered it in some particulars, and caused a new warrant of assessment to be issued. Its action, under the statute, was final and conclusive and is not open to attack in this proceeding. Fallbrook Irrigation District *v.* Bradley, 164 U. S. 112, 167-170, 175; Hibben *v.* Smith, 191 U. S. 310, 321-323; Jelliff *v.* Newark, 48 N. J. L. 101, 109; Embree *v.* Kansas City, &c. Road District, 240 U. S. 242, 247-249." (Italics ours.)

So, too, in *Wurts* vs. *Hoagland,* 114 U. S. 606, 614, it was well stated by Gray, J.:

"The statute of 1871 is applicable to any tract of land within the State which is subject to overflow from freshets, or which is usually in low, marshy, boggy or wet condition. It is only upon the application of at least five owners of separate lots of land included in the tract, that a plan of drainage can be adopted. All persons interested have opportunity by public notice to object to the appointment of commissioners to execute that plan, and no commissioners can be appointed against the remonstrance of the owners of the greater part of the lands. All persons interested have also opportunity by public notice to be heard before the court on the commissioners' report of the expense of the work, and of the lands which in their judgment ought to contribute; as well as before the commissioners, and, on any error in law or in the principles of assessment, before the court, upon the amount of the assessment.

As the statute is applicable to all lands of the same kind, and as no person can be assessed under it for the expense of drainage without notice and opportunity to be heard, the plaintiffs in error have neither been denied the equal protection of the laws, nor been deprived of their property without due process of law, within the meaning of the

Fourteenth Amendment of the Constitution of the United States. *Barbier* v. *Connolly*, 113 U. S. 27, 31; *Walker* v. *Sauvinet*, 92 U. S. 90; *Davidson* v. *New Orleans*, 96 U. S. 97; *Hagar* v. *Reclamation District*, 111 U. S. 701."

And see:

Zahn vs. *Board of Public Works of the City of Los Angeles, supra.*

If further review be necessary in the interest of due process of law, the plaintiff-in-error had the right under Section 20 of the Building Zone Law to appeal to the Board of Appeals to vary any provision of the amendment in the event that there were practical difficulties or unnecessary hardships in carrying out the strict letter of the provisions as against this plaintiff-in-error. And in the event that no relief could be obtained from the Board of Appeals plaintiff-in-error might still have proceeded to obtain a review by the courts by certiorari. *People ex rel. Sheldon* vs. *Board of Appeals*, 234 N. Y. 484. (The effect of failure to appeal to the Board of Appeals will be discussed under Point II).

Plaintiff-in-error acquired no vested right to erect the tenement prior to the adoption of the amendment of October 20, 1922.

Besides the land itself, plaintiff-in-error's only investment was in the preparation of plans and specifications filed with the Superintendent of Buildings (*Rec.*, p. 5). It has been held on innumerable occasions that such rights can be limited or destroyed in the exercise of the police power. Whether they may be entirely destroyed or the degree to which they may be limited is de-

pendent upon the circumstances of the particular case.

C. B. & Q. Ry. Co. vs. *Drainage Comm'rs, supra.*
Barbier vs. *Connolly, supra.*
Laurel Hill Cemetery vs. *San Francisco, supra.*
Welch vs. *Swasey, supra.*
Reinman vs. *Little Rock,* 237 U. S. 171.
Hadacheck vs. *Los Angeles, supra.*
City of New York vs. *Herdje, supra.*
Tenement House vs. *Moeschen, supra.*
St. Louis Poster Advertising Co. vs. *St. Louis, supra.*

In the latter case, plaintiff-in-error had binding advertising contracts affected by the legislation As to them this Court said:

> "As to the plaintiff's contracts, so far as appears they were made after the ordinance was passed, but if made before it they were subject to the legislation not invalid otherwise than for its incidental effect upon them."

And see the quotation from the opinion of Mr. Justice Day in *Northwestern Laundry* vs. *Des Moines,* on page 67, *supra.*

See, too:

Union Bridge Co. vs. *United States,* 204 U. S. 265;
Matter of Cherry vs. *Isbister,* 234 N. Y. 607;
Spector vs. *Building Inspector of Milton, supra;*
Brett vs. *Building Comm'r of Brookline, supra.*

It must be recalled that where substantial construction work has been commenced in good faith, the legislative body—weighing the equities and utilities thereby raised—has exempted them from

amendments to the zoning resolution. See *Sections* 23, 24 and 21.

This court will not countenance an argument that a property right can become vested in the plaintiff-in-error by reason of its own wrongs.

In other words, it gained no rights by its application to build, in violation of its then existing covenants, nor by the expenditures which it may have made in contemplation of its wilful breach of these covenants. It is because of this principle that this court cannot give the Rosevale Realty Company any profit or advantage by reason of acts performed with the avowed purpose of violating the covenants contained in its deed. It is for this reason that the Rosevale Realty Company cannot now be permitted to come into court and insist that because of the fact that it violated its covenants and prepared to reap the profits of its own wrongdoing, prior to the adoption of the Building Zone Law, it is now without the scope of the Building Zone Law which thereby became unconstitutional.

This is the holding of Lewis, J., in an action to which this same Rosevale Realty Co., Inc., was a party and involving the property adjoining that which is the subject matter of this proceeding.

Cohen and ano. vs. *Rosevale Realty Co., Inc.* (October, 1923), *supra.*

It is the result of the same principle applied in:

New York Mutual Life Insurance Co. vs. *Armstrong,* 117 U. S., 591.
Riggs vs. *Palmer,* 115 N. Y., 506.

In the case of *Willerup* vs. *Village of Hempstead,* 120 Misc., 485, 496, the plaintiff had in good

faith entered upon the construction of buildings prior to the adoption of the zoning resolution which made such construction illegal. The Court expressly distinguished the case of *Cohen* vs. *Rosedale Realty Co., supra,* where, as in the instant case, the construction was commenced by the Rosevale Realty Co. in defiance of its restrictive covenants, in the following terms:

> "In *Cohen* vs. *Rosevale Realty Co.* (Faber, J., in New York Law Journal, March 12, 1923), it appeared that the defendant had begun to erect its buildings before the adoption of the Zoning ordinances, but that this had been done in direct violation of a restrictive covenant affecting defendant's premises. No such circumstances appear in the present case. The plaintiff comes into court with clean hands."

Cases Distinguished.

Ignaciunas vs. *Town of Nutley* (N. J. 1924), 125 Atl. 121, is expressly limited to the question of whether the ordinance involved was within the terms of the State Enabling Act. The Court did not pass upon the constitutional point. In any event it is submitted that the approach to the problem by the Court was erroneous. It should not have considered merely the effect of the ordinance upon relator's premises as though the ordinance applied solely to his property, but it should have treated the ordinance in its entirety affecting the relator's property as a part of the town as a whole. Compare *State ex rel. Carter* vs. *Harper, supra.*

Willison vs. *Cooke,* 54 Colo. 320, does not involve zoning in any way. There the ordinance forbade the erection of certain classes of *buildings*

without the consent of property owners in the same block on both sides of the street. It did not appear that the ordinance was passed for the protection of the community. This is merely the converse of the situation existing in *Eubank* vs. *Richmond, supra.*

State ex rel. Penrose Invest. Co. vs. *McKelvey,* 301 Mo. 1, determined by a divided court, held that the zoning ordinance of the City of St. Louis was not within its charter powers. The remainder of the majority opinion dealing with the constitutionality of the ordinance is so thoroughly contradictory of the principles stated in *Hadacheck* vs. *Los Angeles, supra,* and *Reinman* vs. *Little Rock,* 237 U. S., 171, as to make it of no authority in this Court. The dissenting opinion of Walker, J., is commended to the Court.

St. Louis vs. *Evraiff,* 301 Mo. 231, also decided by a divided Court, held that the ordinance prohibiting the use of property for the storage of scrap iron, rags and junk, except in unrestricted districts, was unconstitutional. The majority of the Court could see no relation between such restrictions and the public health and welfare. In this the Court was mistaken, as shown by the testimony of John Kenlon, Chief of the Fire Department of the City of New York, before the Commission on Building Districts and Restrictions, *quoted supra,* wherein he said:

> "I should like to have hazardous trades, especially the storage, transportation and sale of all explosive and *combustible* materials segregated, in different parts of the city. Segregating business of a hazardous kind would lessen the fire danger, and we would not get what we call a conflagration breeder stuck in among a lot of other buildings."

Haller Sign Works vs. *Physical Culture Training School*, 249 Ill. 436, was decided in 1911. Mr. Justice VICKERS, who wrote the opinion, also wrote the opinion in *Cusack Co.* vs. *City of Chicago*, (*affirmed* by this Court in 242 U. S. 526), in which he expressly distinguished the former case on the ground that there the law merely prohibited the erection of structures for advertising purposes near parks and boulevards, and was solely for aesthetic purposes.

Fruth vs. *Board of Affairs*, 75 W. Va. 456 (1915), like the other earlier decisions, did not involve a unified and comprehensive zoning system. The act in question was merely an arbitrary fixing of a building line. It was not shown to have been adopted in the interests of public health and welfare but apparently was merely for aesthetic purposes.

In *Fitzhugh* vs. *City of Jackson*, 132 Miss. 585, it was held that the zoning ordinance was contrary to the State Constitution. It was pointed out that an amendment to the State Constitution had been necessary in Massachusetts where the Supreme Court Justices had held that an ordinance adopted under such amendment would be within the State and Federal Constitutions (234 Mass. 598; 127 N. E. 525, *quoted supra*). Referring to this opinion the Mississippi Court expressly pointed out at page 609:

> "It also held it was not violative of the Federal Constitution, which question we are not considering."

The decision was also based upon a misapprehension of *Spann* vs. *Dallas*, *post*.

State ex rel. Westminster Pr. Church vs. *Edgecomb*, 108 Neb. 859, sustained the Omaha zoning

ordinance except insofar as it confined the building area to 25 per cent. of a lot, which it held to be an unreasonable exercise of the powers granted by the legislature. It is to be noted, however, that all other area restrictions were upheld, including the 40 per cent. area district—which was not even challenged. Furthermore, it is conceivable that a limitation of 25 per cent. of the area might well be considered unreasonable in Omaha; but does it follow that a 50 per cent. restriction is unreasonable in outlying districts of the City of New York?

Again in *Spann* vs. *Dallas,* 111 Texas, 350, the Court did not base its decision upon the ground that the ordinance was invalid under the Federal Constitution. It limited its decision to the application of the State Constitution, distinguishing the Opinion of the Justices of Massachusetts, *supra,* on the ground that an amendment to the Massachusetts Constitution had expressly permitted the adoption of zoning laws.

Furthermore, in *Spann* vs. *Dallas,* the restriction in question was one prohibiting business uses in residence districts, and the ordinance defined a residence district "to be any part of the city where there are more dwelling houses than business houses within a radius of 300 feet from the place where any business house intended for the barter and sale of goods and merchandise of any description, is sought to be constructed". *This is concededly improper zoning.* No district lines are established. There is no stability in the zoning. A building may be in a residence district today and tomorrow it may be in a business zone because of the erection of new buildings within a 300-foot radius. There would be no uniformity

among contiguous buildings similarly situated. In New York, a similar ordinance adopted by the City of Buffalo—the radius in that case being 1,000 feet instead of 300—was declared invalid in *Matter of Kensington-Davis Corporation,* 239 N. Y. 54.

The failure of courts to analyze fully *Spann* vs. *Dallas,* has led to a general misapprehension of its holding and a misapplication of its principles.

In *State ex rel. Lachtman* vs. *Houghton,* 134 Minn., 226; 158 N. W., 1017, and the case thereafter decided by the same Court, *State* vs. *Houghton,* 144 Minn., 1; 174 N. W., 885, this Court is respectfully referred to the dissenting opinions which express a far sounder social view of the police power than do the majority opinions, the view which this Court has taken in the cases above cited.

In the latter case the opinion of Holt, J., expresses the keynote of zoning legislation. It can be summarized in the following words: That giving the people a means to secure for the portion of a city wherein they dwell fit and harmonious surroundings promotes contentment, induces further efforts to enhance the appearance and value of the home, fosters civic pride and tends to produce a better type of citizen. The Judge also uses language which might well be applicable to the relator here:

> "We also know how often the unrestricted use of city lots serves as a means of extortion for the unscrupulous speculator who buys a lot in a desirable residence neighborhood, and then threatens to erect a structure which in appearance, or in the use for which it is designed, will greatly depreciate the surround-

> ing property and be an eyesore to the occupants or owners thereof. To avoid the threatened loss and annoyance, the neighbors are forced to buy the lot at the exhorbitant price fixed, or submit to the injury."

The case of *Ambler Realty Co.* vs. *Village of Euclid, Ohio,* 297 Fed. 307, is by no means as broad as the propositions for which it is cited. There the plaintiff was the owner of a tract of 68 acres of unimproved land near the easterly limits of the City of Cleveland, in the Village of Euclid. His property fronted on Euclid Avenue which, throughout its entire length, including spots within and beyond Euclid Village, was the great business and commercial street of the metropolitan area of Cleveland. Plaintiff's property backed upon the Nickel Plate Railway. The ordinance restricted the use of the land fronting on Euclid Avenue to a depth of 150 feet to single family dwellings. Upon the next 470 feet two-family dwellings were permitted; upon the next 130 feet apartment dwellings were permitted; and upon the remaining 1200 feet, as far as the Nickel Plate Railway, the property could be used for industrial and manufacturing purposes. In holding the ordinance void, the Court expressly stated at page 317:

> "This is not to say that many of the restrictions imposed throughout the village may not be valid, nor that many of them might not be established as against plaintiff's property under the police power. But, however, this may be, all the provisions of the ordinance, so far as they pertain to plaintiff's property, are so intermingled and inseparable that as to its property at least, the ordinance must be declared wholly null and void."

This is far from a holding that zoning *per se* is unconstitutional. Possibly the Court was correct in holding that the zoning ordinance of Euclid was unreasonable in its application to plaintiff's 68 acres of barren property, and especially in restricting to one-family dwellings the frontage upon the principal business and commercial street of the Cleveland metropolitan area.

Upon reading the opinion in the *Ambler case* it is apparent that the Court failed to realize the full significance of *Welch* vs. *Swasey, supra,* and *Reinman* vs. *Little Rock, supra,* for it based its opinion upon the theory that the exercise of the police power in these cases "was sustained because of its intimate relation to the prevention of nuisances". A reading of those two cases will dispel this notion.

On page 315 of the opinion the Court, in discussing the cases of *Welch* vs. *Swasey, Reinman* vs. *Little Rock, Hadacheck* vs. *Los Angeles, Cusack* vs. *Chicago,* and other cases cited in this brief, states:

> "All of them also affirm decisions of state courts of last resort, and much weight is accorded in nuisance cases to the judgment of the judges on the spot and steeped in local tradition."

On Page 316 the Court argued, in discussing the doctrine of the average reciprocity of advantage, that "in the present case, the property values are either dissipated or transferred to unknown or more or less distant owners".

The same language cannot be applied to the instant case wherein it appears that the erection of the tenement house in question "will cause irreparable damage to the residents of Midwood

Manor and will greatly depreciate the value of their properties" (*Rec.*, p. 19). Attention is also called on this subject to the testimony of the President of the Department of Taxes and Assessments of the City of New York, referred to, *supra.*[17]

In *Goldman* vs. *Crowther*, 128 Atl. 50 (Md.), it was expressly admitted in the majority opinion (p. 57) that:

> "property in a populous urban community may be properly subjected to restrictions which would be unreasonable and arbitrary in a thinly settled rural community, so long as the restrictions bear some definite relation to the protection of the public health, morals, safety, or comfort."

It then goes on to argue that the question before the court was different because the police power, as exemplified by the zoning ordinance of Baltimore, cannot be used "for purely aesthetic reasons or for any such elastic and indeterminate object as the general prosperity without compensation."

Aesthetic considerations will be discussed on page 115, *post.* With respect to the general prosperity as the object of the police power, the Court misapprehended the cases of *C. B. & Q. Ry. Co.* vs. *Drainage Comm'rs, supra, and Eubank* vs. *Richmond, supra,* and it completely ignored *Chicago & Alton RR. Co.* vs. *Tranbarger, supra,* and *Wurts* vs. *Hoagland, supra.*

Perhaps the Court of Appeals of Maryland was justified in reaching its conclusion on the ground that the ordinance permitted in residence districts crematories, refuse dumps and sewage disposal plants. This might well create a doubt as to the

[17] *Ibid.* pages 166-171.

adoption of the resolution in the interest of public health and welfare.

On the other hand the dissenting opinion of Bond, C. J., appears to us to be better reasoned and more authoritatively supported.

Erroneous Contentions of Plaintiff-in-Error.

1. Plaintiff-in-error has attempted to raise a false issue by asserting that the "E" zone is merely for the perpetuation of "highly restricted residential developments," that it only creates a restriction for aesthetic purposes.

There is nothing in the restrictions imposed by an "E" zone inconsistent with a valid exercise of the police power. *Highly restricted residential sections* do not merely benefit the property owners in such sections; they promote the health and general welfare of the entire city. **Fire hazard and the task of policing are greatly increased by congestion. Open spaces and light and air undoubtedly contribute to the health of the community. Congestion breeds crime and stimulates epidemics, retards traffic and overloads transportation facilities. This was recognized by the Courts over and over again in sustaining building laws and tenement house laws.**[18]

> *Tenement House* vs. *Moeschen, supra.*
> *Welch* vs. *Swasey, supra.*

In the latter case it was especially stated by Peckham, J.:

> "That in addition to these sufficient facts, considerations of an aesthetic nature also entered into the reasons for their passage, would not invalidate them."

---

[18] *Ibid.* Pages 138-139 re fire hazard.
Pages 123-127, 86-93 re congestion and traffic.
Pages 104-110, 94-96, 195-200, 162-166 re congestion and health.
Pages 98-99 re policing.
Pages 120-121 re street cleaning.

And in *St. Louis Poster Adv. Co.* vs. *St. Louis, supra,* Mr. Justice Holmes said:

> "Possibly one or two details, *especially the requirement of conformity to the building line,* have aesthetic considerations in view more obviously than anything else. But as the main burdens imposed stand on other ground, we should not be prepared to deny the validity of relatively trifling requirements that do not look solely to the satisfaction of rudimentary wants that alone we generally recognize as necessary. *Hubbard* v. *Taunton,* 140 Massachusetts 467, 468."

In *State ex rel. Carter* vs. *Harper, supra,* it was well said:

> "The rights of property should not be sacrificed to the pleasure of an ultra-aesthetic taste. But whether they should be permitted to plague the average or dominent human sensibilities well may be pondered."

2. There is nothing to the argument that, if under Section 19, *supra,* the Building Zone Resolution must be interpreted as applying the "minimum requirements" for the promotion of public health, etc., then there can be no distinction in the application of the resolution to the City, but that the same requirements should prevail throughout. The error in this argument lies in the failure to bear in mind that different circumstances obtain in different portions of the city. It requires no profound insight into building conditions and zoning problems to perceive that varying remedies may be requisite in a district already built up with 20, 40 and 50 story buildings and districts developed by one and two family dwellings; that the situation of industries along the water front and terminal facilities must be different from those in neighborhoods crowded

with tenement houses twenty and thirty years old and these in turn must receive different treatment from undeveloped sections.

It is incumbent upon the legislative body to weigh and balance the city's diverse utilities and needs. These differ according to time, place and condition. Whereas a house may be destroyed to stem a conflagration, it would not follow that a leper must be hung to avoid contamination. Regulations which might have been confiscatory under the conditions obtaining in 1825 are not necessarily confiscatory in 1925. Baltimore, Maryland, and Omaha, Nebraska, may not have the same ills to be cured that New York City has, and the methods adapted to New York requirements may be too drastic for application in smaller communities. These considerations of propriety as to time and place and particular situation must be read into the text of Section 19 of the Building Zone Law. They have been expressly approved by this Court in *Adams* vs. *Milwaukee,* 228 U. S. 572, 581.

See:

Zahn vs. *Board of Public Works of the City of Los Angeles,* at page 89, *supra.*

3. The contention that because of the side yard requirement, it becomes impracticable to construct a house on a small lot and therefore tends to segregate persons of different economic levels, is untenable. The squeezing out process wrought by tenement houses upon small property owners is a much more real evil.[19]

Quoting once again from the report of June 2, 1916, to the Board of Estimate and Apportionment:

"The real demand for single family houses and for multi-family houses with adequate

[19] *Ibid.* Page 30.

> yards and open spaces will not be supplied because builders and investors have learned that such developments are in danger of being ruined by the erection of a few neighboring buildings of a different and more intensive type."[20]

Furthermore, that police requirements will make property-owning unprofitable has never been a reason against its application.

Tenement House vs. *Moeschen, supra.*

4. The distinction between an application of the police power and of eminent domain needs no discussion. To require the City to condemn every piece of property within the borders of its 316 square miles and to recondemn the same upon each amendment of the zoning act is a *reductio ad absurdum.* In this connection it is relevant to point out that no one has previously attacked the zoning resolution of the City of New York on the ground that it is an exercise of the police power rather than in the exercise of eminent domain. *Even plaintiff-in-error failed to raise this point in the State courts.*

State ex rel. Carter vs. *Harper, supra.*

---

[20] *Ibid.* Page 30.

II.

Plaintiff-in-error has no right to challenge the Constitutionality of the Building Zone Law and is not entitled to an order of mandamus, as it has failed to apply to the Board of Appeals for a variation of the Building Zone Law.

Section 20 of the Building Zone Law reads in part as follows:

> "*Rules and regulations; modifications of provisions.*—The Board of Standards and Appeals, created by chapter 503 of the laws of 1916, shall adopt from time to time such rules and regulations as they may deem necessary to carry into effect the provisions of this resolution. Where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of the provisions of this resolution the Board of Appeals shall have power in a specific case to vary such provision in harmony with its general purpose and intent, so that the public health, safety and general welfare may be secured and substantial justice done."

This section was adopted under the authority of Section 242-a of the Greater New York Charter, as amended by Chapter 601 of the Laws of 1917.

The Rosevale Realty Company, Inc., has not made application to the Board of Standards and Appeals for a variation of the resolution of October 20, 1922, by reason of any difficult or unnecessary hardship in the application thereof. This remedy should be pursued prior to an at-

tempt to mandamus the Superintendent of the Bureau of Buildings.

See:

People ex rel. Sheldon vs. *Board of Appeals,* 234 N. Y., 484.

People ex rel. Kannensohn Holding Corporation vs. *Walsh,* 120 Misc., 467, 469.

People ex rel. Cantoni vs. *Moore,* 179 N. Y. App. Div. 121, 123.

Plaintiff-in-error having failed to avail itself of its statutory right of appeal to the Board of Appeals, is not in a position to attack the resolution. *Non constat,* that its appeal would have been denied by the Board of Appeals.

In *Gundling* vs. *Chicago,* 177 U. S. 183 plaintiff-in-error attacked the constitutionality of a statute authorizing the City of Chicago to license persons to sell cigarettes and forbidding a sale of the same without such license. Plaintiff-in-error did not apply for a license. Mr. Justice Peckham said at page 186:

> "It seems somewhat doubtful whether the plaintiff in error is in a position to raise the question of the invalidity of the ordinance because of the alleged arbitrary power of the mayor to grant or refuse it. He made no application for a license, and of course the mayor has not refused it. *Non constat,* that he would have refused it if application had been made by the plaintiff in error. Whether the discretion of the mayor is arbitrary or not would seem to be unimportant to the plaintiff in error so long as he made no application for the exercise of that discretion in his favor and was not refused a license."

Gorham Mfg. Co. vs. *State Tax Commission,* 266 U. S. 265, involved the constitutionality of a tax for the privilege of doing business in New York assessed on the basis of allocated income. The New York statute provided that an aggrieved taxpayer might apply for a revision and obtain a hearing before the State Tax Commission, at which it might submit evidence, and upon which, if it appeared that the account included taxes which could not have been lawfully demanded, the Commission was required to resettle the same "according to law and the facts." The taxpayer had failed to apply for a hearing before the Commission. This Court held that not having exhausted the remedy provided before this administrative board to secure the correct assessment of its tax, the taxpayer could not be heard to assert the invalidity thereof in a suit to enjoin its collection. In the course of the opinion of this Court, Mr. Justice Sanford stated at pages 269, 270:

> "A taxpayer who does not exhaust the remedy provided before an administrative board to secure the correct assessment of a tax, cannot thereafter be heard by a judicial tribunal to assert its validity. *Farncomb* v. *Denver,* 252 U. S. 7, 10; *Milheim* v. *Moffat Tunnel District,* 262 U. S. 710, 723; *McGregor* v. *Hogan,* 263 U. S. 234, 238; *First National Bank* v. *Weld County,* 264 U. S. 450, 455."

In that case appellant was in the same position as the plaintiff-in-error in the instant case, who has failed to utilize the machinery provided for in the Building Zone Law by appealing to the Board of Appeals for a review of the determination of the Superintendent of Buildings.

In *First National Bank* vs. *Weld County*, 264 U. S. 450, cited in the case just referred to, an action was brought by a national bank to recover an amount of taxes levied by the State of Colorado and paid under protest on the ground that they were excessive, discriminatory and in violation of Federal Law. It appeared that the Colorado statute provided for a Board of Equalization, with power to correct assessments and make adjustments in the taxes levied, and the plaintiff-in-error had failed to apply to this tribunal. On this ground the Supreme Court of Colorado sustained a demurrer, and dismissed the complaint. This Court in affirming the judgment stated by MR. JUSTICE SUTHERLAND at page 453:

> "We are met at the threshold of our consideration of the case with the contention that the plaintiff did not exhaust its remedies before the administrative boards and consequently cannot be heard by a judicial tribunal to assert the invalidity of the tax. We are of opinion that this contention must be upheld."

This same principle has been applied in railroad rate cases. *Terminal R. R. Assn.* v. *U. S.*, 266 U. S. 17, 31 and cases there cited.

There is no escape from this proposition, not even by masquerading as a popular champion, as relator does, claiming that it is not asking for a variation of the resolution because its case is exceptional, but that it is attacking the entire amendment. The relator cannot canonize itself as a St. George to go forth and do battle with constitutional dragons. If there "are practical difficulties or unnecessary hardships" in carrying out the strict letter of the amendment, it must be

presumed that the Board of Appeals would relieve the plaintiff and vitiate any tendency which the resolution might otherwise have to deprive the plaintiff of property without due process of law. Because the plaintiff has failed to utilize this agency provided by law for its benefit, it should not be permitted to "damn the system" or to make a fight on behalf of other persons who may come within the terms of the law.

Relator must exhaust its statutory remedies before seeking an order for mandamus and before challenging the constitutionality of such important and beneficent legislation as is this.

Wherefore, the writ of error in the case at bar should be dismissed, or the judgment of the court below affirmed.

James Marshall,
J. George Silberstein,
Counsel for Midwood Manor Association and Pauline R. Kalvin, intervenors, defendants-in-error.

PENDIX

APPENDIX A.

The Enabling Act.

The material portions of Chapter 601 of the Laws of 1917 read:

(Board of Estimate: Power to Regulate Height of Buildings, and to Amend, Supplement, Change and Enforce Regulations.)

§ 242-a. The board of estimate and apportionment shall have power to regulate and limit the height and bulk of buildings hereafter erected and to regulate and determine the area of yards, courts and other open spaces. The board may divide the city into districts of such number, shape and area as it may deem best suited to carry out the purposes of this section. The regulations as to the height and bulk of buildings and the area of yards, courts and other open spaces shall be uniform for each class of buildings throughout each district. The regulations in one or more districts may differ from those in other districts. Such regulations shall be designed to secure safety from fire and other dangers and to promote the public health and welfare, including, so far as conditions may permit, provision for adequate light, air and convenience of access. The board shall pay reasonable regard to the character of buildings erected in each district, the value of the land and the use to which it may be put to the end that such regulations may promote public health, safety and welfare and the most desirable use for which the land of each district may be adapted and may tend to conserve the value of buildings and enhance the

value of land throughout the city. The board shall appoint a commission to recommend the boundaries of districts and appropriate regulations to be enforced therein. Such commission shall make a tentative report and hold public hearings thereon at such times and places as said board shall require before submitting its final report. Said board shall not determine the boundaries of any district nor impose any regulation until after the final report of a commission so appointed. After such final report said board shall afford persons interested an opportunity to be heard at a time and place to be specified in a notice of hearing to be published for ten consecutive days in the City Record. The board may from time to time after public notice and hearing amend, supplement or change said regulations or districts but in case a protest against a proposed amendment, supplement or change be presented, duly signed and acknowledged by the owners of twenty per centum or more of the frontage proposed to be altered, or by the owners of twenty per centum of the frontage immediately in the rear thereof, or by the owners of twenty per centum of the frontage directly opposite the frontage proposed to be altered, such amendment shall not be passed except by a unanimous vote of the board. Said regulations shall be enforced by the superintendent of buildings of each borough and the tenement house commissioner, under the rules and regulations of the board of standards and appeals. Said regulations of the board of estimate and apportionment may provide that the board of appeals may determine and vary their application in harmony with their general purpose and intent and in accordance with general or specific rules therein contained.

* * *

[Board of Estimate; Powers as to location of industries and buildings and enforcement of regulations.]

§ 242-b. The board of estimate and apportionment may regulate and restrict the location of trades and industries and the location of buildings designed for specified uses, and may divide the city into districts of such number, shape and area as it may deem best suited to carry out the purposes of this section. For each such district regulations may be imposed designating the trades and industries that shall be excluded or subjected to special regulations and designating the uses for which buildings may not be erected or altered. Such regulations shall be designed to promote the public health, safety and general welfare. The board shall give reasonable consideration, among other things, to the character of the district, its peculiar suitability for particular uses, the conservation of property values, and the direction of building development in accord with a well-considered plan. The board shall appoint a commission to recommend the boundaries of districts and appropriate regulations and restrictions to be imposed therein. Such commission shall make a tentative report and hold public hearings thereon before submitting its final report at such time as said board shall require. Said board shall not determine the boundaries of any district nor impose any regulations or restrictions until after the final report of a commission so appointed. After such final report said board shall afford persons interested an opportunity to be heard at a time and place to be specified in a notice of hearing to be published for ten consecutive days in the City Record. The board may from time to time after public notice

and hearing amend, supplement or change said regulations or districts but in case a protest against a proposed amendment, supplement or change be presented, duly signed and acknowledged by the owners of twenty per centum or more of the frontage proposed to be altered, or by the owners of twenty per centum of the frontage immediately in the rear thereof, or by the owners of twenty per centum of the frontage directly opposite the frontage proposed to be altered, such amendment shall not be passed except by a unanimous vote of the board. Said regulations shall be enforced by the superintendent of buildings of each borough, the tenement house commissioner and the fire commissioner under the rules and regulations of the board of standards and appeals. Said regulations of the board of estimate and apportionment may provide that the board of appeals may determine and vary their application in harmony with their general purpose and intent and in accordance with general or specific rules therein contained.

* * *

§ 718-d. The appointed members of the board of standards and appeals and the chief of the uniformed force of the fire department, exclusive of the other members, shall hear and decide appeals from and review any rule, regulation, amendment or repeal thereof, order, requirement, decision or determination of a superintendent of buildings made under the authority of title two of chapter nine of this act or of any ordinance or of the fire commissioner under the authority of title three of chapter fifteen of this act or of any ordinance, or of the labor law. They shall also hear and decide all matters referred to them or upon which they are required to pass under any

resolution of the board of estimate and apportionment adopted pursuant to sections two hundred and forty-two-a and two hundred and forty-two-b of this chapter. No member of the board shall pass upon any question in which he or any corporation in which he is a stockholder or security holder is interested.

Hearings on appeals shall be before at least five members of the board of appeals, and the concurring vote of five members of the board of appeals shall be necessary to a decision.

The words board of appeals when used in this chapter refer to the said appointed members of the board of standards and appeals and the chief of the uniformed force of the fire department, when acting under the powers conferred by this section.

Appendix B.

"C" and "E" Zone Requirements.

Section 13 of the Building Zone Law provides:

C *districts.*—(a) In a C district a rear yard at any given height shall be at least three inches in least dimension for each one foot of such height. The depth of a rear yard at its lowest level shall be at least 10 per cent of the depth of the lot but need not exceed 10 feet at such level. An outer court or a side yard at any given height shall be at least one and one-half inches in least dimension for each one foot of such height. An outer court at any given point shall be at least one and one-half inches in least dimension for each one foot of length. On a lot not more than 30 feet in mean width an outer court or a side yard at any given height shall be not less than one inch in least dimension for each one foot of such height and an inner court at any given height shall be either (1) not less than two inches in least dimension for each one foot of such height or (2) it shall be of an equivalent area as hereinafter specified in paragraph c of section 17.

(b) If the owner or owners of any part of a C district set aside perpetually for the joint recreational use of the residents of such part designated by them, an area at least equal to 10 per cent of the area of such part in addition to all yards and court requirements for a B district, such part shall be subject to the regulations herein prescribed for a B district. Such joint recreational space shall be composed of one or more tracts, each of which shall be at least 40 feet in least dimension and 5,000 square feet in area and shall

be approved by the Board of Appeals as suitable for the joint recreational use of such residents.

Section 15 of the Building Zone Law provides:

E *districts.*—(a) In an E district a rear yard at any given height shall be at least five inches in least dimension for each one foot of such height. The depth of a rear yard at its lowest level shall be at least 15 per cent of the depth of the lot, but need not exceed 15 feet at such level. If a building in an E district is located in a residence district as designated on the use district map, the depth of a rear yard at its lowest level shall be at least 25 per cent of the depth of the lot, but need not exceed 25 feet at such level. However, for each one foot in excess of 10 feet of the depth of such rear yard at its lowest level there may be substituted one foot of depth of unoccupied space across the whole width of the front of the lot at the curb level between the street line and the street wall of the building. In an E district on at least one side of every building located within a residence district there shall be a side yard along the side lot line for the full depth of the lot or back to the rear yard.

(b) In an E district an outer court or side yard at any given height shall be least two and one-half inches in least dimension for each one foot of such height. On a lot not more than 50 feet in mean width an outer court or a side yard at any given height shall be at least two inches in least dimension for each one foot of such height. An outer court at any given point shall be at least two and one-half inches in least dimension for each one foot of length.

(c) In an E district no building located within a residence district as designated on the use district map shall occupy at the curb level more than 50 per cent of the area of the lot, if an interior lot, or 70 per cent if a corner lot, and above a level of 18 feet above the curb no building shall occupy more than 30 per cent of the area of the lot, if an interior lot, or 40 per cent if a corner lot. In computing such percentage any part of the area of any corner lot in excess of 8,000 square feet shall be considered an interior lot.

Appendix C.

History of this Litigation.

The following is a summary of the litigation concerning the property of the Rosevale Realty Company, Inc., situated on the northeast corner of East 10th Street and Avenue J, Borough of Brooklyn, City of New York, together with opinions rendered by the several Justices of the Supreme Court.

1.

Kalvin vs. *Rosevale Realty Company, Inc., and Kleinert, etc.*

Motion for injunction *pendente lite* to restrain defendant corporation from building apartment house in violation of restrictive covenants and restraining defendant Kleinert from issuing permit to build apartment house in violation of restrictive covenants. Granted October 20, 1922, by Mr. Justice Lewis as to defendant corporation. See Rec. 38.

2.

Rosevale Realty Company, Inc. vs. *John F. Hylan, et al.* (first action. Motion to enjoin Board of Estimate and Apportionment from acting upon petition to change district from C to E zone. Motion denied by Mr. Justice Lewis on October 10, 1922.

Opinion reads:

"Injunction will not lie to restrain a municipal corporation from the exercise of legisla-

tive or government power. (*Gas & Electric Co.* vs. *Manhattan & Queens Traction Corp'n,* 266 Fed. Rep., 625). Motion denied."

3.

People ex rel., Rosevale Realty Company, Inc. vs. *Kleinert, etc.* (first proceeding). Mandamus to compel Superintendent of Buildings to issue permit to build apartment house. Prior to adoption of zoning resolution amendment of October 20, 1922, but in violation of restrictive covenants contained in realtor's deed. Motion denied October 25, 1922, by Mr. Justice Van Siclen.

Opinion reads:

"The petitioner during the present year purchased a plot of land in Brooklyn upon which it proposed to erect an apartment house. To that end it prepared and filed plans in the proper city department, and a temporary permit was issued. After satisfying the requirements of the department as to the plans the petitioner applied for the final permit. This was refused on the ground that in the interim a petition had been filed by the required number of owners in the vicinity requesting a change in the zoning regulations so as to restrict this and other adjoining property against apartments. That petition has not been as yet acted upon. It appears that the property of the petitioner is at present restricted by a private covenant against apartments, which expires at the end of the present year, and the petitioner was anticipating such event by its improvement. Since this motion has been brought on a temporary injunction has issued out of this Court restraining the petitioner from violating the priv-

ate restriction. By this motion the petitioner seeks to compel the issuance to it of a final permit in advance of any action to be taken on the petition to change the zone. It does not seem to this Court that the application should be granted. It does not appear that the petitioner has any equity in its favor. None of the decisions cited apply to the state of facts here shown. The construction has not yet started, and could not be carried on during the present year except in violation of the private restrictions. If the zone is not changed the petitioner should be free to reapply for relief after the expiration of the private restrictions. At the present time the respondent is in duty bound to respect the rights of the adjoining owners and not issue a permit which would, at least until the coming year, be a violation thereof. The application is denied."

Affirmed by Appellate Division, Second Department, December 1, 1922, 204 App. Div., 883. Opinion reads:

"Although we think that the Superintendent of Buildings has no power or discretion to refuse a permit on the ground that the proposed building violated a restrictive covenant, as this is not a matter for him to decide, yet, in view of the fact that this Court has issued an injunction prohibiting the petitioner from constructing the building in question, we have decided to affirm this order, without prejudice to an application to be made after the vacation or termination of the injunction. Order affirmed, without costs."

The instant case: *People ex rel., Rosevale Realty Company, Inc.* vs. *Kleinert, etc.* (second proceeding). Mandamus to compel Superintend-

ent of Buildings to issue permit to build apartment house, after adoption of amendment to zoning resolution on October 20, 1922, and expiration of restriction covenants January 1, 1923. Pauline R. Kalvin and Midwood Manor Association, intervenors. Motion denied by Mr. Justice Faber, March 10, 1923.

Opinion printed in Transcript of Record at page 41.